

No. 12962

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS, Also Known as
Della Nicholson,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Central Division

No. 6221-PH

ELEUTERIA BROWN ARENAS, Also Known as
DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR TRUST PATENT

The plaintiff complains of the defendant and for
cause of action alleges:

I.

That she is a citizen of the United States of
America and of the State of California; that she
is of Indian blood and descent, and is a duly enrolled
and recognized member of the Palm Springs or
Agua Caliente Band of Mission Indians of Cali-
fornia; that she was born in the year 1912; that she
is the adopted daughter of Lee Arenas, and all
her life has resided or maintained a residence upon
the Palm Springs Reservation of said Band of
Indians.

II.

That the Secretary of the Department of In-
terior of the United States, acting under the au-
thority of the Act of Congress of January 12, 1891
(26 Stat. L. 712-714) as amended June 25, 1910,

(36 Stat. L. 855-865) and March 2, 1917, (39 Stat. L. 976) did, on or about the 7th day of June, 1921, conclude and determine that, in his opinion, the aforesaid Mission Indians of California were so far advanced in civilization as to be capable of owning and managing land in severalty, and did thereafter, on or about the 1st day of July, 1921, appoint one H. E. Wadsworth as Special United States Allotting Agent at Large for the Mission Indian Reservations of California and said appointment became effective on said date; that in order to carry into effect the aforesaid opinion and determination of the Secretary of the Interior the said H. E. Wadsworth accepted, qualified and became the Special United States Allotting Agent at Large for the Mission Indian Reservations of California with authority of law in him vested to make allotments of lands in severalty to said Indians; that acting pursuant to said authority said special allotting agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs or Agua Caliente Reservation of Mission Indians of California in order that allotments thereof in severalty should be made by said Special Allotting Agent to the members of said Band of Mission Indians in accordance with the Statutes of the United States therefor provided.

III.

That thereafter, on or about the 21st day of June, 1923, said Special Allotting Agent, acting pursuant to instructions and directions given him by the Secretary of the Interior and the Statutes

of the United States therefor provided, did allot to plaintiff the following described lands, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township [3*] 4 South, Range 4 East S.B.M., comprising forty (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule of June 21, 1923, said lands being a part of the Palm Springs Mission Indian Reservation in Riverside County, California; that thereafter said Special Allotting Agent issued and delivered to plaintiff a certificate of allotment to said lands under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

IV.

That thereafter, on or about the 26th day of October, 1923, said Special Allotting Agent, acting under the authority vested in him by the Secretary of the Interior and the Statutes of the United States therefor provided, did state and represent to plaintiff's foster father, Lee Arenas, that the issuance and delivery of said certificate of allotment entitled plaintiff to enter upon and take possession of the lands allotted to her, and that said

*Page numbering appearing at foot of page of original Certified Transcript of Record.

certificate of allotment was and would be evidence of plaintiff's right to possess, hold and improve said lands, pending the issuance of a trust patent therefor to her; that thereafter plaintiff, believing and relying upon said certificate and the aforesaid statements and representations of said Special Allotting Agent, did improve said lands by erecting thereon buildings and other permanent structures and improvements suitable for use for residential, commercial and business purposes at a cost in excess of the sum of \$1,500.00 and that she would not have made said improvements and would not have expended said sum upon said lands excepting for said conduct, statements and representations of the Secretary of the Interior and said Special Allotting Agent.

V.

That thereafter, on or about the 5th day of January, 1927, the Secretary of the Interior did attempt to withdraw the allotments made by said Special Allotting Agent to the several members of the [4] Palm Springs Band of Mission Indians in the year 1923, and thereupon did instruct and direct said Special Allotting Agent to make reallotments of the lands previously surveyed and classified to such members of said Band of Indians as had previously made or should thereafter make voluntary selections of allotments from said lands; that thereafter, acting pursuant to said instructions and directions and at the request of plaintiff, said Special Allotting Agent, on or about the 9th day of May, 1927, did reallot to plaintiff the above described lands and on said date did issue and de-

liver to plaintiff and plaintiff accepted a certificate of allotment to the above described lands, under which plaintiff became entitled to an allotment trust patent thereto and to the sole and exclusive possession and use thereof.

VI.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the aforesaid matters, facts and things, plaintiff became and at all times after the 21st day of June, 1923, has been, and is now, the equitable owner of the above-described lands with the improvements she placed thereon, and at all such times has been and is now entitled to an allotment trust patent thereto and to the sole and exclusive possession and use and enjoyment thereof free and clear of all claims and demands of the defendant whatsoever.

VII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent, it became and at all times since the 21st day of June, 1923, has been, and is now, the mandatory duty of the Secretary of the Interior to issue to plaintiff a trust patent to the above-described lands, but notwithstanding said mandatory duty the Secretary of the Interior [5] has at all such times failed and neglected to issue said trust patent to plaintiff.

VIII.

That by reason of the aforesaid Acts of Congress and the aforesaid acts, conduct, proceedings, statements and representations of the Secretary of the Interior and said Special Allotting Agent and the aforesaid matters, facts and things, the defendant is estopped to question, or deny, plaintiff's equitable title to the above described lands, or her right to an allotment trust patent thereto, or her right to the sole and exclusive possession, use and enjoyment thereof.

Wherefore, plaintiff prays:

1. That it be adjudged, ordered and decreed by this Court:

(a) That plaintiff is and was at all times mentioned in this complaint a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California.

(b) That on the 21st day of June, 1923, the United States of America allotted, and on the 9th day of May, 1927, reallotted in severalty to plaintiff, Eleuteria Brown Arenas, also known as, Della Nicholson, the lands described in Paragraph III of this complaint, and that plaintiff is entitled to an allotment trust patent to said lands from the United States of America.

(c) That the trust period of twenty-five years provided in the Mission Indian Act of 1891 (26 Stat. L. 712), during which the lands allotted and reallotted to plaintiff shall remain in trust shall begin to run from the 21st day of June, 1923.

2. That a copy of the judgment and decree of this Court be certified to the Secretary of the Interior of the United States of America.

3. That plaintiff have such other and further relief as justice and equity may require, including the costs of this action.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE, and

ROBERT A. SMITH,

By /s/ JOHN W. PRESTON,

Attorneys for Plaintiff. [6]

State of California,
County of Riverside—ss.

Eleuteria Brown Arenas, also known as Della Nicholson, being by me first duly sworn, deposes and says: that she is the plaintiff in the above-entitled action; that she has read the foregoing Complaint for Trust Patent and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ ELEUTERIA BROWN
ARENAS.

Also known as:

/s/ DELLA NICHOLSON.

Subscribed and sworn to before me this 12th day of April, 1945.

[Seal] /s/ DAVID D. SALLEE,
Notary Public.

[Endorsed]: Filed Jan. 9, 1947. [7]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED STATES
OF AMERICA

Comes now the defendant, United States of America, and answers plaintiff's Complaint as follows:

I.

Answering paragraph I defendant denies that at or prior to May 9, 1927, plaintiff was a duly or otherwise enrolled or a duly or otherwise recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, but does admit that she was so enrolled and recognized at the date of the filing of her Complaint and at all times thereafter, and denies that plaintiff is the adopted daughter of Lee Arenas; and denies that said plaintiff, during all of her lifetime, has resided or maintained a residence upon the Palm Springs Reservation of said Band of Mission Indians.

II.

Answering paragraph II of said Complaint defendant admits the allegations therein contained

excepting that it alleges that the authority of H. E. Wadsworth as such Special Allotting Agent was limited to the authority to make [8] selections for allotment in severalty to members of the Palm Springs or Agua Caliente Reservation of Mission Indians of California who had chosen for themselves the lands to be selected for allotment to them; that such limitation upon the right, power, and authority of said Special Allotting Agent has been finally adjudicated and established by decisions of the United States Supreme Court and the United States Circuit Court of Appeals for the Ninth Circuit, in the following cases, to wit: *Arenas v. United States*, 322 U. S. 419, and *United States v. Arenas*, 158 F. 2d 730 (C.C.A. 9), *Certiorari denied*, 331 U. S. 842.

III.

Defendant denies that Special Allotting Agent H. E. Wadsworth allotted to plaintiff the lands described in paragraph III of her Complaint, but admits that he did prepare and deliver to the Commissioner of Indian Affairs a document entitled "Selections for Allotment" in and upon which he listed the lands described in paragraph III of the Complaint as his selections for allotment in severalty made for plaintiff.

Defendant denies that said Special Allotting Agent delivered to plaintiff a Certificate of Allotment to said lands or any part thereof, and denies that thereby, or otherwise, or at all, plaintiff became entitled to an allotment trust patent thereto or that thereby, or otherwise, or at all, plaintiff

became entitled to the sole or exclusive possession or sole or exclusive use or any possession or use of said lands or any part thereof.

IV.

Defendant denies each and every of the allegations contained in paragraph IV of plaintiff's Complaint.

V.

Answering paragraph V of plaintiff's Complaint, defendant admits that following the making of the 1923 selection for allotment the Secretary of the Interior instructed and directed H. E. Wadsworth, as Special Allotting Agent, to make new selections for allotment for and in behalf of such members of the Palm Springs Band of Mission Indians as should make voluntary selections for allotment out of the unallotted lands of said Band adjacent to the Town of Palm Springs, California, and that, thereafter, on or about May 9, 1927, said Special [9] Allotting Agent did prepare and submit to the Commissioner of Indian Affairs a new schedule of Selections for Allotment in and upon which the lands described in paragraph III of plaintiff's Complaint were designated and identified as the lands selected for allotment in severalty to plaintiff.

Defendant further admits that on May 9, 1927, said Special Allotting Agent did issue a writing entitled "Selection for Allotment" in which he certified that said lands described in paragraph III of plaintiff's Complaint had been selected by plaintiff.

Defendant denies that by reason of the acts of

said Special Allotting Agent, or otherwise, or at all, plaintiff became entitled to an allotment trust patent to said lands or became entitled to the sole or exclusive possession or became entitled to the sole or exclusive use thereof.

Except as herein admitted, defendant denies all of the allegations in paragraph V of plaintiff's Complaint.

VI.

Defendant denies the allegations contained in paragraph VI of plaintiff's Complaint, but admits that if plaintiff can establish that on and after January 8, 1927, she was a member of the Palm Springs Band of Mission Indians; that she then was and now is the adopted daughter of Lee Arenas; that the selections of the lands described in paragraph III of plaintiff's Complaint were chosen and made by someone authorized to act for and in behalf of plaintiff (who was then a minor and who, plaintiff alleges, was then incompetent to make such selection in her own behalf) prior to May 9, 1927, then plaintiff has done and performed everything that she could do and which the law then required her to do as a condition precedent to obtaining a trust patent under the provisions of Title 25 U.S.C., Section 345; 31 Stat. 760, under the principles established in the final decisions in the cases of *Arenas vs. United States*, 322 U. S. 419, and *United States vs. Arenas*, 158 F. 2d 730 (C. C. A. 9), *Certiorari denied*, 331 U. S. 842, and that by reason thereof plaintiff has become entitled to the issuance to her, in the manner provided by law, of an allotment

trust patent in severalty to the lands described as Parcels (a), (b), and (c) in paragraph III of plaintiff's Complaint, effective as of and to commence to run from May 9, 1927, but [10] that failing proof of such conditions precedent, she is not entitled thereto.

VII.

Defendant denies each and every allegation contained in paragraph VII, excepting that it admits that the Secretary of the Interior of the United States has not issued or delivered to plaintiff an allotment trust patent in severalty to the lands described in paragraph III of plaintiff's Complaint.

VIII.

Plaintiff denies each and every allegation contained in paragraph VIII of plaintiff's Complaint.

Wherefore, defendant demands judgment that plaintiff take nothing by her Complaint and that it be dismissed with costs.

Dated November 25, 1947.

JAMES M. CARTER,
United States Attorney,
IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant,
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 25, 1947. [11]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR THE
ADMISSION OF EVIDENCE

It Is Hereby Stipulated in the above-entitled cause that the Order of Submission therein be set aside and those two certain Exhibits found in case No. 1321 styled, "Lee Arenas vs. United States" and designated as Exhibit F-1 No. 17 and Exhibit F-1 No. 19 be received as evidence in the above cause. Copies of said Exhibits above referred to are attached to this Stipulation and designated as Exhibits "A" and "B" respectively.

Dated this 9th day of April, 1948.

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,

By /s/ JOHN W. PRESTON,

Attorneys for Plaintiff. [13]

JAMES M. CARTER,

United States Attorney.

IRL D. BRETT,

Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,

Attorneys for Defendant.

ORDER

It Is Hereby Ordered, that pursuant to the annexed Stipulation the Order of Submission heretofore made is hereby set aside and the documents set forth in said Stipulation are hereby received in evidence.

Dated this 12th day of April, 1948.

/s/ CHARLES C. CAVANAH,
Judge. [14]

EXHIBIT A

Exhibit F-1 No. 17

“Exhibit No. 17

“Jan. 26, 1923.

“Mr. Harry E. Wadsworth,
“Special Allotting Agent,
“Thermal, California.

“Dear Mr. Wadsworth:

“Your attention is again invited to the correspondence relative to the allotting of a portion of the lands of the Torres-Martinez Indian Reservation.

“This will advise you that the Tribal Roll, recently prepared and forwarded to the Office by you, has been accepted as correct and will constitute the basis for assigning the allotments. It is noted that there were 213 persons eligible to receive allotments at the date on which that roll was completed. It is also observed from the Classification Schedule,

submitted with your report of June 27, 1921, that there are within the Torres-Martinez Reservation approximately 11,000 acres of land, classified as irrigable, in addition to that not susceptible of irrigation.

“It is evident, from the above data, that there is land available for allotting each enrolled Indian 40 acres of the land classified as irrigable, and it has been decided to take action along that line. You are directed, therefore, to begin the allotting of said Torres-Martinez lands as soon as your present assignment has been completed, which you have stated would be about February 1, 1922.

“The land involved has already been surveyed into townships and sections and the survey accepted by the General Land Office. You are instructed to assign the allotments in tracts of approximately 40 acres each of irrigable lands only. It is very important that the allotment selections be described in legal sub-divisions and made to conform to the public survey. If, however, in some instances it seems necessary to approve selections that [15] do not conform to the survey, such cases should first be referred to the Office, with rough plats and other data showing the conditions obtaining, and you will receive instructions as to the advisability of listing such selections on the schedules. It is assumed that you have satisfactory plats and maps of the territory to be allotted, in your possession, or available for consultation.

“No allotment selection should be permitted on any land other than that classified as irrigable, since

it is contemplated to encourage the placing of each allotment, or at least a portion thereof, under irrigation as soon as possible. The lands classified as not susceptible of irrigation will remain in the tribal status pending future disposition.

“The allotments herein authorized will be made under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L., 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969-76). The allotment selections should be listed, as made and reported, and Certificates issued therefor on Form 5-201. Care should be exercised in that connection to issue the Certificates only in cases where you are satisfied that the person for whom the land is selected is living. The names of those Indians who shall have died since the roll was prepared should be disregarded, and on the other hand, the names of children born, to duly enrolled members, may be added to the roll and may be allotted up to such date as you may set for the completion of the allotment schedules.

“Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you.

“If any Indian has acquired an equitable right to a specific [16] tract of land by reason of occupancy, improvement, and use, such right should

be recognized and protected as fully as possible by permitting him, or members of his family, to select such land. Each allotment selection should be marked in a definite manner with corner posts, and the same should be pointed out to the allottees whenever it is practicable.

“The allotment schedules should be made in triplicate, on Form 5-176. On each schedule should be placed the allotment number, the name of the allottee, relationship, sex, age, and the description of the land as indicated by the column headings. You should allow not less than three lines between the allotment descriptions, to provide for available space that may be needed in the future to enter new descriptions if modifications should be necessary. On the last page of each copy of the schedules should be placed a certificate showing the date on which the listing of allotment selections began, also the date on which said work closed, together with a statement to the effect that the allotments shown thereon were made in accordance with the provisions of the Acts of Congress herein before cited, and said certificate should be dated and duly signed by you. When completed the original and duplicate copies of the schedules should be transmitted to the Office and the triplicate copy placed in the Agency files.

“All allotment selections should be reproduced graphically on tracing cloth township plats (Form 5-177a), and the name of each allottee, and the allotment number, should be shown on the diagram.

Only one copy of said plats should be prepared, which copy should be forwarded to the Office with the schedules.

“Monthly reports in duplicate showing the status of the work should be submitted to the Office on Form 5-250, within ten days after the expiration of the month. All doubtful questions which may arise should be referred to the Office and specific instructions will be given for your guidance. The necessary forms for use in [17] the work are being sent to you under separate cover, and your request for any additional supplies found necessary may be made on Form 5-262.

“Sincerely yours,

“CHAS. H. BURKE,

“Commissioner.

“Approved: Jan. 26, 1922.

/s/ R. M. GOODMAN,

“Assistant Secretary.

“Copy to: Northern Mission Agency. [18] 1-PG-20.”

EXHIBIT B

Exhibit F-1 No. 19

“Exhibit No. 19

“Nov. 29, 1922.

“Mr. Harry E. Wadsworth,

“Special Allotting Agent,

“Thermal, California.

“Dear Mr. Wadsworth:

“Reference is again made to the correspondence in regard to allotting the lands on the Cabazon and the Augustine Indian Reservations under the jurisdiction of the Mission Agency in California. You are hereby instructed to proceed with the allotting of those two reservations as soon as the surveying crew, which will be detailed by the General Land Office, reports for duty.

“This letter will also be your authority to proceed with the allotting of the other Mission Indian Reservations in the order in which it may be deemed advisable to take them up in the progress of your work. All such allotments will be made under the laws cited in the letter of instructions to you of January 26, 1922, pertaining to the Torres-Martinez Reservation, and you will also be guided by the other general instructions contained in that letter.

“It is observed from the classification schedule and your report thereon covering the Cabazon and Augustine Reservations, which were recently submitted to the Office, that there are thirty Indians

eligible to receive allotments on the Cabazon Reservation, and that there will be a sufficient area of good land to allot them forty acres each. It is further noted that there are sixteen Indians eligible to receive allotments on the Augustine Reservation and that there will be sufficient land to make those allotments in forty acre tracts also.

“Upon examining the records it is noted that irrigation projects are being developed on each of those reservations, [19] there now being approximately 75 acres under ditch at Cabazon and 50 acres at Augustine. Great care should be exercised in allotting the land that is already under irrigation and the equitable rights of the parties now using those lands should be protected as fully as practicable without detriment to the band as a whole.

“The irrigation reports in the Office show that the source of water supply for each of those reservations consists of wells constructed by the Government, six wells at Cabazon and three at Augustine.

“It is the opinion of the Office that it will be very advantageous if a small tract of land on which the wells are located, or if they are not in a group, a small tract on which each well is located, can be segregated by the surveyor and reserved from allotment. It is desired therefore that you endeavor to make some such adjustment in the matter if it is at all practicable.

“The necessary forms for use in the work are being forwarded to you under separate cover and your request for any additional supplies found

necessary may be made on Form 5-262. Copies of the township plats as photographed from the records of the General Land Office will also be furnished for your reference.

“Sincerely yours,

“CHAS. H. BURKE,

“Commissioner.

“11-CMS-27

“Approved: Nov. 29, 1922.

/s/ “E. C. FINNEY,

“First Assistant Secretary.”

[Endorsed]: Filed April 12, 1948. [20]

[Title of District Court and Cause.]

DECISION

Cavanah, District Judge.

This is an action brought by the plaintiff of Indian blood and descent for a decree that she is, and was, at all times mentioned in her complaint a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, and that on June 21st, 1923, the United States allotted, and on May 9th, 1927, re-allotted in severalty to her the lands in question from which she asserts that she became, and is now, entitled to an allotment trust patent thereto

from the United States and the sole and exclusive possession and use thereof.

Plaintiff was born in the year 1913, and was taken at the age of three years to live as one of a family of Lee Arenas on the reservation who was a regularly enrolled member of the Band of Mission Indians. She lived and remained as a member of his family and given the name of Arenas until some time subsequent to the allotment proceedings of 1927 involved here.

It will be observed that this is a special proceeding brought under Title 25, section 345, U.S.C.A., which provides that a decree of a United States District Court in favor of [21] any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. The Supreme Court in the case of *Lee Arenas v. United States*, 322 U. S. 419, 88 L. ed. 1363, has recognized the right of an Indian to adjudicate his rights under this statute and the decree of the court shall stand in lieu of the Secretary's action if the Indian was unlawfully denied a patent to an allotment to which he was entitled. Congress has defined this right as to all allotments to be selected by the Indians, heads of families selecting for their minor children, and the agent of the Government shall select for an orphan child appointed for that purpose. Title 25, Section 332 U.S.C.A.

The record discloses that and prior to the allotment proceedings of 1927, the plaintiff was a duly

enrolled member of the Palm Springs Band of Mission Indians, as her name appears in the census or Tribal Roll of the members of the Palm Springs Band, in 1923, and 1927, and also in the schedules of Selection for Allotments for 1923 and 1927, and was enrolled as a member of the Palm Springs Band of Mission Indians.

On March 19, 1927, a written request was made to Commissioner of Indian Affairs through H. E. Wadsworth, Special United States Allotting Agent that she be given an allotment of land of the reservation and that a trust patent covering the same be issued in which her name appears by "Lee Arenas Father." Thus it will be seen that the Act of Congress makes it mandatory on the Special Agent of the Government to select allotments for an orphan child when in making selections for Indians. This was done by the Special Agent of the Government [22] for the plaintiff who was an orphan at the time and an enrolled member of the Palm Springs Band of Mission Indians. The Allotting Agent was specially authorized by the Commissioner of Indian Affairs to make selections for orphans and minors or by some one who he may regard as competent to do so. While the father of the plaintiff was then living and she was living with Lee Arenas who made the selection for her, the Special Agent of the Government accepted and regarded Lee Arenas as competent to make the selection. These are the two thoughts which, under the evidence, make the selection and allotment of the plaintiff legal and entitle here to be considered

as being duly enrolled and a recognized member of the Palm Springs Band of Mission Indians, and entitled to an allotment trust patent to the lands selected and allotted to her.

It may further be said that the claim of the plaintiff does not rest upon any right to inherit from, or through, Lee Arenas, but is, as has been said, based upon her right as a duly enrolled member of the Palm Springs Band of Mission Indians to an allotment of the lands involved here situated in the Palm Springs Reservation.

The further question presented relates to whether the plaintiff's attorneys should be allowed reasonable compensation as an attorney fee for their services and reimbursed for costs and expenses made by them in the suit and declared a lien on the allotment.

This being an equitable action, the court may retain jurisdiction of the cause and parties for the purpose of allowing and fixing attorney fees and costs and expenses of suit as between the attorneys and client at some future date. *Sprague v. Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184; *United States v. Equitable Trust Co.*, 283 U. S. 738, [23] 75 L. ed. 1379; *United States v. Anglin & Stevenson*, 145 F. 2d 622; and whether a lien should be declared on the allotment involved here, to the extent of whatever amount is hereafter found due as such attorney fees and costs and expenses.

I find that the record does not contain evidence to enable the court at this time to determine that question. As counsel for the plaintiff at the time

of submission of the case and in their brief urged the court to retain jurisdiction of the cause and parties for that purpose, I have concluded to do so and hear and determine the question. The parties are granted twenty days within which to present testimony and briefs bearing upon the question as to whether the court should allow and fix attorney fees and the amount thereof for counsel for the plaintiff, and reimburse them for whatever amount they have necessarily expended, if any, in connection with the suit as costs and expenses; and whether they should have a lien on the allotment involved in the case, or to decree an undivided interest in the allotment of the amount of such allowance. In other words, that question is left open to be finally decided by the court. Should counsel decide to submit the evidence upon depositions and further briefs, that is satisfactory to the court. When this final question is disposed of by the court, counsel for the plaintiff will then prepare findings of fact and conclusions of law and decree covering the conclusion here reached and to be further determined by the court.

[Endorsed]: Filed May 20, 1948. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 30th day of March, 1948, before the Honorable Charles C. Cavanah, Judge, sitting without a jury, a jury having been expressly waived, John W. Preston, Esq., Oliver O. Clark, Esq., and David D. Sallee, Esq., appearing as counsel for the plaintiff, and James M. Carter, United States Attorney, and Irl D. Brett, Special Assistant to the Attorney General, appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties and the argument of counsel, and being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the Court in said action are hereby [25] made:

Findings of Fact

I.

That the plaintiff, Eleuteria Brown Arenas, is a citizen of the United States of America and of the State of California; that she is of Indian blood and descent and is, and has been ever since a date prior to the 21st day of June, 1923, a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians of California; that she was born in the year 1912, and since she was about three years of age has at all

times resided upon the Palm Springs Reservation of said Band of Indians.

II.

That from about the year 1915 until after May 9, 1927, the plaintiff was a member of the family and resided in the home of Lee Arenas and Guadalupe Arenas, his wife; but plaintiff was never adopted by the said Lee Arenas and Guadalupe Arenas, or either of them.

III.

That on or about the 7th day of June, 1921, the Secretary of the Department of Interior of the United States of America, acting under the authority of the Act of Congress of January 12, 1891 (26 Stat. L. 712-714), as amended on March 2, 1917 (39 Stat. L. 976), did conclude and determine that all of the members of the above-mentioned Band of Mission Indians of California were so far advanced in civilization as to be capable of owning and managing land, in severalty, and, thereafter, acting upon said determination, did on or about the 1st day of July, 1921, appoint one H. E. Wadsworth as Special United States Allotting Agent at Large for all of the Mission Indian Reservations of California, and said Agent duly qualified as such and his said appointment thereupon became effective as of said above-mentioned date.

That acting under said appointment and pursuant to said above-mentioned Statutes and the Act of February 8, 1887 (24 Stat. L. 388), as amended

on June 25, 1910 (36 Stat. L. 855-865), said [26] Special Allotting Agent caused to be surveyed, platted and classified certain of the lands of the Palm Springs or Agua Caliente Reservation of Mission Indians of California in order that allotments thereof, in severalty, could be advantageously made by him to the members of said Band of Mission Indians in accordance with the said Statutes and in the manner provided by law.

IV.

That thereafter, to wit, on or about the 9th day of May, 1927, and pursuant to selections made for her by Lee Arenas, who was authorized and qualified to act, and was acting for and representing the plaintiff, the said Special Allotting Agent, acting pursuant to the instructions and directions given to him by the Secretary of the Interior and pursuant to Statutes of the United States therefor provided, did prepare and certify a schedule of allotments for and including each of the members of the Agua Caliente or Palm Springs Band of Mission Indians who had theretofore made, or for whom there had ben made, selections of lands for allotment, and did therein allot to the plaintiff the following described lands on said Reservation, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East S.B.M., comprising forty (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule.

That the area so allotted to plaintiff, as shown by the Special Allotting Agent's Schedule of May 9, 1927, comprised forty-seven (47) acres of land formerly a part of the Palm Springs Mission Indian Reservation in Riverside County, California; that thereafter [27] said Special Allotting Agent issued and delivered to plaintiff a document entitled, "Selection for Allotment" in words and figures as follows, to wit:

"Selection for Allotment

"On Agua Caliente Indian Reservation, 1927

"This is to certify that Eleuteria Brown Arenas has selected the Lot 50, Sec. 14, Tract No. 41, Sec. 26, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 26, all in Township 4 South, Range 4 East of the San. Ber. M., containing 47 acres, more or less, according to Government Survey Stake No.....

"Not valid unless approved by the Secretary of the Interior.

"6-1060

/s/ "H. E. Wadsworth,

"U. S. Special Allotting
Agent."

That plaintiff accepted said Certificate of Selection for Allotment, and the lands described therein as and for her allotment.

V.

That the said Schedule of May 9, 1927, was duly forwarded by said Special Allotting Agent to the Commissioner of Indian Affairs in the office of the Secretary of the Department of the Interior at Washington, D. C. That the Commissioner of the General Land Office approved the said schedule insofar as it was applicable to the plaintiff herein, and thereafter the Commissioner of Indian Affairs duly forwarded said schedule to the Secretary of the Interior for his consideration and approval; that the Secretary of the Interior did not formally act thereon or approve or disapprove said schedule until on or about the 14th day of December, 1944, when the Secretary of the Interior purportedly disapproved said schedule of May 9, 1927, in toto. [28]

VI.

That the plaintiff complied with all requirements of the Act of January 12, 1891 (26 Stat. L. 712-714), as amended by the Act of March 2, 1917 (39 Stat. L. 976), and the Act of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), necessary to complete an allotment to her under the Schedule of May 9, 1927.

VII.

That the trust period under which said allotment is *how* held by the plaintiff pursuant to the provi-

sions of said Act of January 12, 1891 (26 Stat. L. 712), began to run on the 9th day of May, 1927, and will expire under the terms of said statute on the 9th day of May, 1952.

VIII.

That the plaintiff in this action is a restricted Indian and, although competent to contract for the payment of Court costs, attorneys' fees and expenses of litigation, cannot encumber or burden the lands allotted to her without the approval of the Commissioner of Indian Affairs and the Secretary of the Interior; that therefore this is a proper cause within which to retain jurisdiction for the purpose of allowing attorneys' fees and fixing the amount thereof, and costs and expenses of suit, and for providing security therefor, and for the payment thereof, and for disposing of any issues and matters in connection therewith.

From the foregoing facts the Court concludes:

Conclusions of Law

I.

That plaintiff is entitled to judgment against the defendant, the United States of America, as follows:

That on the 9th day of May, 1927, the United States of America duly allotted in severalty to Eleuteria Brown Arenas, the plaintiff herein, certain lands situated within the Palm Springs [29] or Agua Caliente Mission Indian Reservation in

Riverside County, State of California, as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ NE $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East S.B.M., comprising (40) acres, totaling 47 acres, as shown by said Special Allotting Agent's Schedule.

II.

That the plaintiff was, on the 9th day of May, 1927, a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California, and as such was duly qualified in every way to receive said allotment; that said plaintiff duly performed all conditions on her part to be kept and performed under the law to entitle her to said allotment.

III.

That plaintiff's right to said allotment arose on the 9th day of May, 1927, and on said date she became and ever since has been and now is the equitable owner of said allotment and, as such owner, is entitled to a trust patent from the United States of America to the lands included in said allotment pursuant to Section 5 of the Act of January 12, 1891 (26 Stat. L. 712).

IV.

That the trust period provided for in the Act of January 12, 1891 (26 Stat. L. 712), under which said allotment was made and is now held by the plaintiff, began to run on the 9th day of May, 1927, and will expire under the terms of said statute on the 9th day of May, 1952. [30]

V.

That the several attorneys for the plaintiff have incurred expenses and have performed valuable services for the plaintiff in this action; that said attorneys are entitled to a reasonable and proper allowance for their fees for services rendered to the plaintiff and for expenses of suit in this action; that this is a proper cause for the Court to retain jurisdiction of the parties and subject-matter thereof for the purpose of determining the value of such services and the amount of such expenses and for the payment, security, and discharge thereof and for the making and enforcing of such orders in connection therewith as this Court may deem just and proper.

Let judgment be entered accordingly for the plaintiff.

Dated this 21st day of May, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

Approved as to Form:

JAMES M. CARTER,
United States Attorney;

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant.

[Endorsed]: Filed June 23, 1948. [31]

In the United States Court of Appeals
for the Ninth Circuit

No. 12,218

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS, Also Known as
Della Nicholson,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Appeal from the District Court of the United States
for the Southern District of California,
Central Division

March 23, 1950

Before: Stephens and Pope, Circuit Judges, and
Ling, District Judge

Stephens, Circuit Judge

OPINION

This case, both as to fact and as to law, practically parallels the companion case No. 12,046 this day decided¹ which concerns attorneys' fees and expenses owing by Lee Arenas. We fully treated the fundamental issues of this case in the companion case.

¹No. 12,046, Lee Arenas v. John W. Preston, Oliver O. Clark and David D. Sallee; United States of America and Lee Arenas v. John W. Preston, Oliver O. Clark, and David D. Sallee.

The district judge in the instant case fixed attorney fees on a percentum value basis of the allotted land unrestricted by any interest of the United States and made an allowance for expenses. He ordered the land impressed with a lien to secure payment of the attorneys' fees and expenses and ordered the land sold forthwith by a commissioner in discharge of the indebtedness. The lien was ordered impressed and the attorney fee was fixed upon the theory that the allotment was entirely free from any interest of the United States. A mere reading of our opinion in the companion case will clearly show that such theory was wrong and substantially affected the court's conclusions and judgment and constituted reversible error.

The record shows on its face that whereas \$100 was allowed as expenses, only \$15 was actually expended. The judgment should be reduced in accordance with these facts.

The case is remanded to the district court with instructions to proceed to fix an attorney fee and to secure its payment by the impressment of a lien on the allotted property all in accord with our expressions in the Lee Arenas case. Any lien impressed upon the property should be foreclosable only after a reasonable period has elapsed in which payment could be made.

Affirmed in part, reversed in part, and remanded.

[Endorsed]: Opinion. Filed Mar. 23, 1950. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12,218

UNITED STATES OF AMERICA, et al.,
Appellants,
vs.
JOHN W. PRESTON, et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court
for the Southern District of California, Central
Division.

This Cause came on to be heard on the Tran-
script of the Record from the United States District
Court for the Southern District of California, Cen-
tral Division, and was duly submitted.

On Consideration Whereof, It is now here ordered
and adjudged by this Court, that that part of the
judgment of the said District Court in this Cause
which allows appellees the sum of \$100.00 for
costs and expenses be, and hereby is reduced to the
sum of \$15.00 and that this cause be, and hereby
is remanded to the said District Court with in-
structions to determine the sum of money for which
amount the lien against the allotted property is
to be impressed. Upon such determination having
been made and upon the lien having been accord-
ingly impressed upon the property the judgment
shall stand affirmed, except as to proper assignments
of error which may be claimed to have occurred
in the determination herein ordered. The District

Court should retain jurisdiction to do all things necessary in regard to the lien as it did in the judgment under review here, and any lien impressed upon the property should be foreclosable only after a reasonable period has elapsed in which payment could be made, each party to bear its own costs on appeal.

Filed and entered March 23, 1950.

PAUL P. O'BRIEN,
Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 6221

ELEUTERIA BROWN ARENAS, Also Known
as DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

OPINION

Cavanah, District Judge:

The nature of the problem now presented to the court for determination is to comply with the opinion and decree of the Ninth Circuit Court of Appeals, 181 Fed. (2d) 62, 67, and the pertinent provisions upon remand, that the District Court

should proceed to fix the dollar value of the services performed by the attorneys for the plaintiff and the manner of how they are to be paid, by the impressment of a lien on the allotted property, as the appellate court said that, "The district court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien and in doing so should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indians' interest in the allotted land under the trust patent, as one of the elements to be taken into consideration, see *Sampsell v. Monnell*, 9 Cir., 1947, 164 Fed. (2d) 4. The case is remanded to the District Court with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed. . . . The case is remanded to the District Court with instructions to proceed to fix an attorney fee and to secure its payment by the impressment of a lien on the allotted property all in accord with our expressions in the *Arenas* case No. [103] 12,046."

The court realizes that the ultimate question here under the decision of the Court of Appeals is, what is the extent of the Indians' interest in the allotment involved under the Act of Congress which allows the Indians different interest in the Palm Springs Reservation. That ultimately has to be decided by the court in fixing the value of the attorney fees for the services they have rendered in this case. The plaintiff, an Indian allottee, has a

trust patent to an allotment in the reservation consisting of forty-seven acres under the Act of Congress which provides certain restrictions. Title 25 U.S.C.A., Secs. 348 and 391. The petitioners represented her in requiring the defendant United States to issue to her the trust patent, resulting in a decree in her favor in this court which was affirmed by the Ninth Circuit Court of Appeals, 181 Fed. (2d) 62, *supra*, with the instructions as above stated.

The Supreme Court in the *Arenas* case, 322 U. S. 419, has held that the Indians under the Act of Congress were entitled to an allotment of lands in severalty and a trust patent thereto in the reservation; and therefore, the nature of the title of the plaintiff is one held in trust by the United States under the restrictions, while her title in reality is a fee simple title, and the restrictions placed upon alienation during the trust period do not debase her right below a fee simple. It is a vested interest under the Act of Congress. *United States v. Paine Lumber Co.*, 206 U. S. 467; *Libby v. Clark*, 118 U. S. 250; *United States v. Minnesota*, 113 Fed. (2d) 770; *Eastman v. United States*, 28 Fed. (2d) 807. Under the 5th Amendment of the Constitution, the estate of an Indian allottee under a trust patent is one in fee simple and in which his right is vested. *Morrow v. United States* (9th Cir.), 243 Fed. 854; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Choate v. Trapp*, 224 U. S. 665. [104]

Having then expressed the thought that the In-

dian allottee has a fee simple title to the allotment, subject only to the restrictions enumerated in the patent trust act, the market value of the fee title is the guide to what the value is to the Indian.

In ascertaining the market value of a given tract of land, you may consider its location, surroundings, and purposes for which it is adapted. It does not sanction a remote or speculative value. The plaintiff will be entitled to a fee patent in May, 1952. There appear considerable conflicting testimony between the parties as to what is the market value of the allotment secured by the present action. The facts considered by the parties when in fixing the fee value of the three tracts here involved vary considerably as to the market value of the forty-acre tract. Considering then the value of the three tracts of land involved separately, the court reaches the conclusion as follows: Two-acre-tract: \$20,000 per acre of a total of \$40,000. The five-acre-tract: \$66,000, as those two tracts are situated near business property and Indian Avenue, making a total value of those two tracts to be \$106,000. As to the value of the forty-acre tract which is situated one-half mile from Ramson road or business property, is \$60,000, and is removed from any accessibility, and a road must be built and has to be developed and it lies in the center of a wash-area, making a total reasonable value of the three tracts to be \$166,000 as the plaintiff's interest in the allotment under the trust patent and is one of the elements to be considered and deter-

mined under the decision and mandate of the Court of Appeals in the present case.

It will be remembered from a reading of the record that there appears extreme views given by expert witnesses for plaintiff and respondent, and the court is forced to consider also other facts and circumstances. Counsel for respondent asserted at the oral argument that the attorneys should be paid a reasonable and substantial fee. The final inquiry then is that the attorneys' fees involved should be measured by the market value of plaintiff's estate in fee, [105] in determining the value of petitioners' legal services to the plaintiff and they are those rendered to the plaintiff in the present case. It appears that the petitioners rendered legal services in the Arenas case in obtaining the final decision of the Supreme Court that the Indians under the Trust Patent Act were entitled to a trust patent to the allotments included in the Supreme Court's decision, which related to the Palm Springs Band of the Mission Indians, and should pay their proportion of the attorneys' fees as the result of that decision, added to the interest and value of each allotment and the reasonable amount thereof in this case would be an attorney fee of \$5,000.00.

The conclusion is thus reached that, as the value of the plaintiff's estate is \$166,000, a reasonable attorney's fee for the legal services rendered by the petitioners is \$20,750.00, plus \$5,000.00 for the services rendered in the Arenas case, making a total attorney's fee of \$25,750.00, to be paid to the petitioners as attorneys' fees, with a lien upon plain-

tiff's allotted land to secure the payment thereof, and the item of \$15.00 as costs allowed by the Court of Appeals in the previous hearing. The plaintiff is given six months within which to pay the judgment, and if not paid within such time the allotment be sold as provided by the Federal Rules and Statutes to satisfy the payment; and the court reserves jurisdiction over the cause and parties until the payment is fully satisfied.

The motions of the respondents to strike the opinions of the witnesses, Beckley and Gallagher, and other witnesses, as to values are denied. Counsel for petitioners to prepare and present findings and decree.

[Endorsed]: Filed Jan. 29, 1951. [106]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee heretofore regularly filed their petition in the above-entitled cause praying that the court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for

the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition came on regularly for hearing, after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled court, Honorable Charles C. Cavanah, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the northeast corner of [107] Temple and North Spring Streets, in the City of Los Angeles, State of California, on the 27th day of November, 1950;

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their official capacities;

Whereupon, in accordance with the decisions of the United States Court of Appeals for the Ninth Circuit, reported in *Arenas v. Preston, et al.*, 181 F. 2d 62, and *United States v. Preston, et al.*, 181 F. 2d 69, and the mandates issued pursuant to the judgments of said court in said causes, evidence, both oral and documentary, was offered and received, and the cause was submitted to the court for decision upon argument and briefs of respective counsel; and the court being fully advised in the premises, the following findings of fact and con-

clusions of law constituting the decision of the court in said proceeding for a supplemental decree, as aforesaid, are hereby made, to wit:

Findings of Fact

I.

That on or about the 20th day of November, 1940, the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, orally employed petitioners Oliver O. Clark and David D. Sallee, and on or about the 9th day of December, 1944, said plaintiff in writing employed petitioners John W. Preston, Oliver O. Clark and David D. Sallee, to represent her as her attorneys in all matters respecting an allotment of lands in severalty to her in the Palm Springs Reservation of Mission Indians, County of Riverside, State of California, and agreed thereby to compensate petitioners for their services on a quantum meruit basis and to reimburse them for expenses of suit [108] in her behalf.

II.

That said petitioners, prior to the filing of their petition herein, fully performed and completed the duties of their said employment.

III.

That each of the allegations contained in Paragraphs I, II, III, IV, V, VI and XIII of the petition for supplemental decree herein is true.

IV.

That petitioners have not been paid, nor have

they received any sum whatsoever for the services rendered by them in this action. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Fifteen Dollars (\$15.00), no part of which has been paid or refunded to them. That all of said compensation and expenses are due and unpaid.

V.

That the lands described in Paragraph IV of said petition for supplemental decree herein lie within or near the City of Palm Springs, County of Riverside, State of California, and are subject to restrictions against alienation during the trust period which, unless said period can legally be extended by Presidential order, will expire on or about the 9th day of May, 1952.

VI.

That the reasonable value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this court, is as follows:

Value of Lands Allotted to Plaintiff

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising 2 acres.....	\$ 40,000.00
Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres	\$ 66,000.00

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of
 Section 26, Township 4 South, Range 4
 East, S.B.M., comprising forty (40)
 acres\$ 60,000.00

Total value of said Parcels....\$166,000.00

VII.

That the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above-entitled cause for which said petitioners are entitled to receive as compensation the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), said amount being the reasonable value of said legal services. That no part of said amount has been paid to the petitioners, and all of said sum is due and unpaid.

VII.

That it is reasonable and equitable that until the compensation and expenses of suit due to the petitioners from the plaintiff, as described and set forth in Paragraphs IV and VII of these Findings, are fully paid that the petitioners be secured by an equitable lien upon the whole of the lands allotted to the plaintiff, said lands being fully described in Paragraph VI of these Findings.

VIII.

That it is reasonable and equitable that the plaintiff be allowed a period of six (6) months from the

date of the entry of the supplementary decree in this cause within which to pay the compensation and expenses of suit herein found to be due to the petitioners.

IX.

That it is reasonable and equitable that if the plaintiff [110] shall fail to pay the amounts to be found to be due and unpaid to said petitioners, the lands described in Paragraph VI hereof, or so much of said lands as may be necessary, shall be sold to pay and satisfy the compensation and expenses of suit due from said plaintiff to said petitioners.

X.

The value of the services rendered by petitioners in the Lee Arenas case for the benefit of respondent-plaintiff was \$5,000, and the value of the petitioner's services rendered in the present case was \$20,750.00.

Attendance in court by petitioners were in excess of five days.

From the foregoing facts, the Court concludes:

Conclusions of Law

I.

That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee, are entitled to receive as compensation for their services to the plaintiff in the above-entitled action the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), and the petitioners are also entitled to reimbursement from the plaintiff the sum of Fifteen

Dollars (\$15.00), advanced by said petitioners as costs and expenses of suit, and to judgment and decree for said compensation, costs and expenses.

II.

That the petitioners are entitled to an immediate equitable lien upon the lands allotted to plaintiff, said lands being fully described in Paragraph VI of the foregoing Findings of Fact, herein, to secure the payment of the compensation, costs and expenses of suit as described and set forth in Paragraph I of these Conclusions; and upon the entire interest of plaintiff and her heirs in said lands, if any, in the hands of the United States of America, until said compensation, costs and expenses shall be fully paid and satisfied.

III.

That the court should retain jurisdiction over this action and the parties thereto and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, a judicial sale of plaintiff's lands shall be made [111] and the proceeds thereof distributed as set forth in Paragraph I of these Conclusions, and in order to require and compel the enforcement, or the satisfaction and discharge, of the equitable lien awarded to the petitioners; and for the purpose of appointing a commissioner to make said sale and to distribute the proceeds thereof; and, generally, for the purpose of effectuating and enforcing fully the judgment and decree herein, in

accordance with the equitable jurisdiction, practice and procedure of this court.

IV.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Dated this 28th day of February, 1951.

Allowed Feb. 28, 1951.

/s/ CHARLES C. CAVANAH,
Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,
Attorneys for the Defendant.

[Endorsed]: Filed Mar. 2, 1951. [112]

United States District Court, Southern District
of California, Central Division

No. 622-PH Civil

ELEUTERIA BROWN ARENAS, Also Known as
DELLA NICHOLSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AND
SUPPLEMENTAL DECREE

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly filed their petition in the above-entitled cause praying that the Court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled Court, Honorable Charles C. Cavanah, a Judge thereof, presiding in the Courtroom of said Court

in the United States Post Office Building at the Northeast corner of Temple and Spring [113] Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 27th day of November, 1950.

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their said official capacities;

Whereupon, evidence, both oral and documentary, was offered and received, and the cause was submitted to the Court for decision upon briefs of respective counsel; and the Court having made and filed its findings of fact and conclusions of law and having ordered that judgment be entered in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, have and recover from the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in the above-entitled action the sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750.00), which includes said sum of \$5,000 referred to in the Findings of Fact.

Second: That the petitioners have and recover from the plaintiff the further sum of Fifteen Dollars (\$15.00), heretofore paid by the petitioners for the use and benefit of the plaintiff in the above-entitled action.

Third: That the payment of the compensation awarded hereby to the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, and the payment of said sum of Fifteen Dollars (\$15.00), heretofore paid by said petitioners for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the lands allotted to said plaintiff under [114] the allotment proceedings of 1927, and upon all rights conferred upon said plaintiff by said allotment proceedings, and upon the entire interest and estate of said plaintiff and her heirs in said lands, and upon the entire interest, if any, in said lands in the hands of the United States of America; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, and until said sum of Fifteen Dollars (\$15.00), paid by said petitioners for the use and benefit of said plaintiff, shall be fully paid and satisfied. The lands allotted to said plaintiff, upon which said equitable lien is impressed by this judgment and supplemental decree, are situated in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, County of Riverside, State of California, and are more particularly described as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres,

said three tracts totaling forty-seven (47) acres, as shown by the Special Allotting Agent's Schedule of May 9, 1927.

Fourth: That the plaintiff, Eleuteria Brown Arenas, also known as Della Nicholson, be and she is hereby allowed a period of six (6) months from and after the date of the entry of judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, as described and set forth in Paragraphs First and Second hereof.

Fifth: That if the said plaintiff shall fail to pay and [115] fully satisfy the compensation and expenses of suit awarded to said petitioners, as described and set forth in Paragraphs First and Second hereof, within six (6) months from the date of the entry of judgment and supplemental decree herein, then and in that event the lands allotted to said plaintiff, as described in Paragraph Third hereof, shall be sold pursuant to the further orders and direction of the Court and in the manner and form provided by the federal statutes, and the proceeds of such sale, or sales, shall be distributed

as follows, to wit: (1) to pay the costs and expenses of sale, including fees of a commissioner to make such sale; (2) to the payment of the compensation and expenses of suit awarded hereby to said petitioners; and (3) the balance shall be paid to the United States of America in trust for the plaintiff.

Sixth: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction practice and procedure of this Court.

Seventh: That the parties to this proceeding pay their own [116] costs, respectively, incurred herein.

Dated this 28th day of February, 1951.

Allowed Feb. 28, 1951.

/s/ CHARLES C. CAVANAH,
U. S. District Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,
Attorneys for the Defendant.

Judgment entered March 2, 1951.

[Endorsed]: Filed March 2, 1951. [117]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, and Eleuteria Brown Arenas, also known as Della Nicholson, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment and Supplemental Decree made and entered herein on March 2, 1951, in Judgment Book 71, at page 254, in favor of John W. Preston, Oliver O. Clark, and David D. Sallee, petitioners, and against Eleuteria Brown Arenas, also known as Della Nicholson, plaintiff and respondent, and the

United States of America, defendant and respondent, and from the whole thereof.

Dated May 1, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Appellants.

[Endorsed]: Filed May 1, 1951. [118]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, appellants in the above-entitled cause, submit the following statement of points which will be relied upon on appeal:

1. The Court erred in assuming jurisdiction to determine the petition for attorneys' fees and moneys advanced as expenses of suit in this proceeding;

2. The Court erred in finding, concluding and adjudging that petitioners were entitled to an equitable lien upon the trust patent allotments to secure the payment of attorneys' fees and moneys

advanced as expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien;

3. The Court erred in finding, concluding and adjudging that the lands involved should be sold at public [120] auction to satisfy the lien in the event that the judgment for fees and expenses was not paid, and in failing to find and conclude that it was without jurisdiction so to do;

4. The Court erred in awarding to petitioners an additional \$5,000 for services rendered in the Lee Arenas litigation (No. 1321-O'C Civil);

5. The Court erred in finding (Finding No. I) that Eleuteria Arenas had on or about November 20, 1940, orally employed petitioners Clark and Sallee as her attorneys;

6. The amount of the fees awarded to petitioners is excessive and not supported by competent evidence;

7. The Court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein;

8. The values found for the various parcels of the restricted allotment are excessive and not supported by competent evidence;

9. The Court erred in valuing the various parcels as of the date of the judgment in the allotment proceedings in 1948 rather than as of the date of the hearing on attorneys' fees.

10. The Court erred in denying the motion to strike the opinions of value given by petitioners' witnesses Beckley and Gallagher for the reason that such opinions were based upon improper considerations.

Dated May 22, 1951.

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [121]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, appellants in the above-entitled cause, designate the following for inclusion in the record on appeal:

1. Complete list of Clerk's docket entries to and including entry of September 8, 1948;
2. Complaint for trust patent, filed January 9, 1947;
3. Answer, filed November 25, 1947;

4. Stipulation and order for admission of evidence, including Exhibits A and B, attached thereto;
5. Opinion, filed May 20, 1948;
6. Findings of Fact and Conclusions of Law, filed June 23, 1948;
7. Petition for supplemental decree for attorneys' fees, etc., filed September 29, 1948; [123]
8. Order to Show Cause, filed September 29, 1948;
9. Special Appearance of and Motion to Dismiss by the United States, filed October 28, 1948;
10. Affidavit of Irl D. Brett, filed October 28, 1948;
11. Answer of respondent Eleuteria Brown Arenas, filed October 28, 1948;
12. Answer of United States, lodged October 28, 1948;
13. Reporter's transcript of the proceedings of October 29, 1948;
14. Petitioners' Exhibits Nos. 1 to 7, inclusive;
15. Opinion, filed January 3, 1949;
16. Findings of Fact and Conclusions of Law, filed February 4, 1949;
17. Judgment and Supplemental Decree, filed February 4, 1949;
18. Notice of Appeal, filed February 14, 1949;
19. Minute Order of March 16, 1949;
20. Statement of Points on Appeal, filed April 4, 1949;
21. Opinion of United States Court of Appeals for the Ninth Circuit in C. A. No. 12218, filed March 23, 1950;

22. Judgment of United States Court of Appeals for the Ninth Circuit in C. A. No. 12218, filed March 23, 1950;

23. Reporter's Transcript of trial proceedings on November 27, 28 and 29, 1950;

24. Petitioners' Exhibit Nos. 8, 9 and 10; and Respondents' Exhibits A to U, inclusive;

25. Opinion, filed January 29, 1951;

26. Findings of Fact and Conclusions of Law, filed March 2, 1951;

27. Judgment and Supplemental Decree, filed March 2, 1951;

28. Notice of Appeal, filed May 1, 1951;

29. Statement of Points on Appeal;

30. This Designation of Record. [124]

Dated May 22, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the
Attorney General,

By /s/ IRL D. BRETT,
Attorneys for Defendant,
United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [125]

In the United States District Court, Southern
District of California, Central Division

No. 6221-PH Civil

ELEUTERIA BROWN ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Charles C. Cavanah, Judge, Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Petitioners:

JOHN W. PRESTON, ESQ.,
712 Rowan Building,
Los Angeles, California.

For Defendant and Respondent United States
of America, and Respondent Eleuteria
Brown Arenas:

IRL D. BRETT, ESQ.,
Special Assistant to the Attorney
General.

November 27, 1950, 10:00 A.M.

The Clerk: Eleuteria Brown Arenas vs. United
States of America, No. 6221-PH.

The Court: You may proceed whenever you are ready.

Mr. Preston: Your Honor, we are ready for the petitioners.

Mr. Brett: The plaintiff and respondent Eleuteria Brown Arenas, also known as Della Nicholson, represented by the United States Attorney, and the United States of America, defendant, are ready, with this one observation. At a stage of the proceedings this morning I desire to recall a valuation witness offered by the petitioners——

Mr. Preston: You want to wait until we get our case in first, don't you?

Mr. Brett: Yes. In connection therewith, I wanted to use a deposition I took in Palm Springs on the 9th of this month. It has just been handed to me, and I would like about a five-minute recess when we are about to reach that.

The Court: Very well.

Mr. Preston: May it please the court, we are here today following a mandate of the Circuit Court of Appeals for the purpose of fixing the attorneys' fees for the petitioners in this case in dollar value as distinguished from a percentage interest in the property involved. A study of that [2*] opinion of the Circuit Court of Appeals and the mandate thereon convinces me that we are here for the purpose of fixing attorneys' fees founded upon several factors. Those factors are enumerated in various decisions of the state court, and also by the federal decisions. I have a memorandum that I prepared on the law of this case, certain branches of the law,

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

that I anticipated might come up, and I will pass it up, if the court would like to have it.

The Court: Very well.

Mr. Preston: And I will give Mr. Brett a copy.

Mr. Brett: Thank you.

Mr. Preston: Now, as I view that decision of the Circuit Court of Appeals, the percentage fixed by this court is no longer necessarily applicable. The question of fixing the fees is set at large, it is true, and the decision in all other respects affirmed, but that necessarily, in my judgment, sets at large the question of percentage.

I don't know whether the court has had any chance to study this record or give any thought to this subject since the trial before, but I take it what we are interested in here is the fixation of these fees on the various factors that enter into the subject, one of which is the value of the property under the trust patent, whether that is the value to the Indian or the market value, or the nature of the Indian's interest in it, or all questions that may have [3] to be considered by this court. When the time comes to argue those questions, I want to be heard and, of course, I know the government desires also to be heard.

The length of this hearing and the breadth of this hearing will largely depend upon the court's view of what the nature of the Indian's title is to his allotment.

I want to supplement the brief that I handed you with a quotation from *Choate vs. Trapp*, 224 U. S. at 665, which deals with the nature of the property

of an Indian in his allotment. It holds that it is a vested interest protected by the Fifth Amendment. In the footnote of the Circuit Court of Appeals decision, there are numerous cases quoted by the writer of the opinion to portray and to declare the nature of the Indian's title in an allotment.

I don't want to make an argument at this time, but I do want to have it understood that probably sooner or later during the hearing we will have to enter into an argument as to just what the court is going to value in this case.

In order to start the hearing, I ask that the record show that the reporter's transcript heretofore taken in this proceeding, the exhibits introduced in evidence at that hearing, including the depositions of Oliver Clark, David D. Sallee, and John W. Preston, be all considered as a portion of the hearing in this case. I understand there is no objection to that. [4]

In order to facilitate the court's consideration of these items I have just enumerated, I desire to offer in evidence as our Exhibit 1 on this hearing, I take it a transcript on appeal, which contains everything that I have referred to in these other three items, and probably some other things, and in order to facilitate the hearing, I would like to have the court accept one of these printed transcripts in order to be advised at all times of what is in these documents that are before you.

The Court: Would that conflict with the exhibit numbers at the original hearing?

Mr. Preston: It might. I don't know.

The Clerk: You have 1 to 7 at the original hearing.

Mr. Preston: Better have that Exhibit 8 then.

The Court: Do you recall any others?

Mr. Preston: I don't know of any others. This will be Exhibit 8 of this hearing, then, following consecutively after the exhibits at the previous hearing.

Mr. Brett: Your Honor, I didn't want to be discourteous and interrupt the judge. I have no objection to the offer of the transcript of the record on appeal, which is now offered as Exhibit 8, subject to this requested condition, that it is offered on a new matter and that I be permitted to further cross-examine any of those witnesses as it may appear to be necessary to do so. [5]

I understand, and I believe it is correct, that the last statements of Judge Preston have properly disclosed that the two items previously referred to, to wit, the reporter's transcript of the evidence, the exhibits, and the depositions of the three petitioners, are incorporated in this one printed document, which has now been offered as Petitioner's Exhibit 8.

The Court: Very well.

The Clerk: That will be marked Petitioner's Exhibit 8.

(The document referred to was received in evidence and marked Petitioner's Exhibit 8.)

Mr. Preston: Your Honor, I have brought here today a distinguished member of the bar that I

would like to have testify, with the court's consent, as an expert witness on the valuation of attorneys' fees based upon the record that has been introduced in evidence and upon a hypothetical question I have prepared to propound to him.

The Court: You may do so.

Mr. Preston: Mr. Martineau, will you take the stand? [6]

L. R. MARTINEAU, JR.

called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: L. R. Martineau, Jr.

Mr. Preston: Would the court like a copy of the proposed question?

The Court: No. You can go ahead. I will follow you.

Mr. Preston: I imagine, as an experienced trial judge, you will take everything that is deemed to be at all pertinent, and then consider it or throw it out afterward.

Direct Examination

By Mr. Preston:

Q. Mr. Martineau, where is your residence?

A. Los Angeles, California.

Q. What is your avocation or vocation or calling or profession?

A. I am an attorney at law.

(Testimony of L. R. Martineau, Jr.)

Q. Did you take a law degree before admission to the bar? A. I did. [7]

Q. Where did you take you degree?

A. I had my college A.B. at Harvard, and my law degree, LL.B., at Harvard Law School.

Q. What year? A. In 1912.

Q. You got cum laude in one of your degrees, too, I see. A. That is right.

Q. And you were admitted to practice first in what state?

A. To the bar of the Supreme Court of Utah.

Q. What year? A. August 16, 1912.

Q. Are you admitted to the bar of any other state besides California?

A. Yes. I was admitted to the Circuit Court of Appeals of the Northern District of California in 1913. I was admitted to the Supreme Court of the State of Idaho by special order of court on 1918. I was admitted to the Supreme Court of the State of California in 1927. I am a member of the Bar of the Supreme Court of the United States and of other federal courts.

Q. Recite your further memberships. Are you a member of the State Bar of California?

A. I am.

Q. And when did you become a resident of California? [8] A. In April, 1927.

Q. Tell us what has been the general nature, if you can describe it, of your practice at the bar.

A. My practice has been in general related to fields of corporation law and finance, administrative

(Testimony of L. R. Martineau, Jr.)

law, and trial work in state and federal courts in contested matters, including certain specific work for the United States of America as a special assistant to the Attorney General of the United States.

Q. Were you ever associated with a man now known as Judge Harold M. Stephens?

A. I was.

Q. He is now Chief Judge of the Court of Appeals of the District of Columbia, is he not?

A. That is true. Harold M. Stephens, Chief Judge of the Court of Appeals of the District of Columbia, is a former partner of mine.

Q. Have you testified in proceedings similar to this before? A. Yes.

Q. On about how many different occasions, to your knowledge?

A. I hadn't thought of being asked that question. It might be somewhat hard to recall, but I would say more than a half dozen and maybe as many as a dozen. [9]

Q. Did you testify as an expert witness in the evaluation of witness fees in the Lee Arenas case?

A. I did. May I ask, Judge Preston, whether you, in your former question antecedent to this one, were referring to times when I had been sworn as a witness?

Q. Witness in the matter of attorneys' fees.

A. You are not referring to the times I have been consulted in other capacities in that connection?

Q. No. Only the times you have testified as an

(Testimony of L. R. Martineau, Jr.)

attorney in the matter of fixation of fees. What is your answer now?

A. May the question be read?

Q. I will reframe it. About how often have you been called in actions where you were interrogated as to your opinion as to the value of attorneys' fees?

A. Well, not too frequently, Judge Preston, because most of those matters do not come for judicial attention, but I would say, over the course of the years, I have been sworn and have testified in somewhere between a half dozen and a dozen cases.

Q. I asked you previously whether you testified in this court in Action No. 1321, known as the case of Lee Arenas v. the United States.

A. I did.

Q. And in that case you examined the transcript, did [10] you not?

A. I examined a great deal more than the transcript, but included in the work that I did, I examined the transcript.

Q. The transcript and the briefs, and what else did you examine in that case?

A. I examined what you denominated in your question as the record in that case, but that also involved not what a clerk of the United States Court would call a record that he certified, but what you called a record. In addition to that, the law of the cases which had to be reversed, and other judicial opinions which affected the outcome in the Lee Arenas case.

(Testimony of L. R. Martineau, Jr.)

Q. You have at my request made a study of certain records in this case, have you not?

A. I have.

Q. What have you examined in this case?

A. I have examined what you have offered, I believe, as Exhibit 8 in this hearing this morning. If I may see it for a moment, I will check that answer by the number of the transcript, which is 12,218, in the United States Court of Appeals.

Q. I furnished you also another transcript, did I not?

A. You did. You furnished me a copy of Transcript No. 12,046 in the United States Court of Appeals, entitled "Lee Arenas v. John W. Preston, et al.," and a transcript of a [11] record which appears to have been received by you in 1949.

May I complete my answer, Judge?

Q. Yes, go ahead.

A. In addition to that, I examined the depositions of Oliver O. Clark, David D. Sallee, and John W. Preston, each of whom is a member of the bar, I believe, in Case No. 6221-PH Civil, and the reporter's transcript of certain proceedings had in the Eleuteria Brown Arenas case against the United States, denominated in the United States District Court for the Southern District of California No. 6221-PH Civil, which occurred commencing on March 23, 1948.

Q. Mr. Martineau, I would like to propound to you a hypothetical question. I am going to read it to you. Have you a copy before you?

(Testimony of L. R. Martineau, Jr.)

A. I have a copy here, sir.

Q. Please assume the existence of the following facts as the basis of your opinion of the value of legal services rendered by three attorneys, namely, John W. Preston, Oliver O. Clark, and David D. Sallee, for and at the request of the plaintiff in this cause, Eleuteria Brown Arenas, in securing for her an allotment of lands in severalty on the Palm Springs Indian Reservation in Riverside County, California, and a judicial adjudication of her right to a trust patent thereto;

Assume: that when plaintiff was about two or three years of age she was taken into the home and was thereafter treated [12] as a member of the family of Lee Arenas and his wife Guadaloupe Arenas, both of whom were of Indian blood and descent and duly enrolled members of the Palm Springs Band of Mission Indians; that thereafter Lee Arenas and Guadaloupe Arenas reared, supported, and educated plaintiff until she was fourteen or more years of age; that while a member of said family plaintiff was adopted into and became a duly enrolled member of said Band of Indians, and at all times since has been, and now is, a duly enrolled member of said Band; that some time prior to the 9th day of May, 1927, Lee Arenas, acting for the plaintiff in loco parentis, requested in writing of H. W. Wadsworth, who was then the duly appointed, qualified and acting Allotting Agent of the United States of America for all of the Bands of the Mission Indians of California, in-

(Testimony of L. R. Martineau, Jr.)

cluding the Palm Springs Band, that plaintiff be allotted in severalty certain lands on the Palm Springs Reservation described as follows, to wit:

Parcel (a) Homesite: Lot 50, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 41, of Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and

Parcel (c) Desert: SW $\frac{1}{4}$ of NE $\frac{1}{4}$ in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres; that the lands so selected for the plaintiff were included in a Schedule of Allotments prepared and transmitted by said [13] Allotting Agent to the Secretary of the Interior on or about May 9, 1927; that thereafter the Secretary failed and refused to approve or disapprove said selection, or any other selections for allotment made by or for the members of said Band of Indians, and failed and refused to issue trust patents to any of the members of said Band covering the lands selected for allotment by them.

Assume that in the year 1940 Lee Arenas, acting for himself and also for the members of his family, including the plaintiff, employed Messrs. Sallee and Clark to file and prosecute a test case against the United States of America to determine the right of said persons to allotments in severalty and trust patents to the lands selected by them, and each of them, on or prior to May 9, 1927, in accordance with

(Testimony of L. R. Martineau, Jr.)

and as shown by the Schedule of Allotments prepared and transmitted by said Alloting Agent to the Secretary of the Interior; and that thereafter a test case was prepared and filed by said attorneys in the name of Lee Arenas against the United States on the 24th day of December, 1940, in the United States District Court for the Southern District of California, Central Division, being No. 1321-O'C Civil in said court.

Assume: that after the decision of the Supreme Court of the United States in *Lee Arenas v. United States of America*, 322 U. S. 419, 64 S. Ct. 1090, holding, in effect, that Lee Arenas was entitled to an allotment of lands in severalty and [14] a trust patent thereto, the attorneys mentioned filed an action on behalf of the plaintiff Eleuteria Brown Arenas against the United States to determine her right to an allotment of and trust patent to the lands heretofore described and prosecuted said action to judgment in the United States District Court for the Southern District of California on the 18th day of May, 1948, to the effect that plaintiff was, on the 9th day of May, 1927, and is now, entitled to a trust patent to said lands.

Assume: that the following work was done by said attorneys, Preston, Clark, and Sallee, in the test case of *Lee Arenas v. United States of America*, being No. 1321-O'C Civil in this court, to wit:

Mr. Brett: Just minute. If the Court please, as to this particular assumption——

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: I better read it all and then you can make your objection.

Mr. Brett: It is now in reference to the work that these three petitioning attorneys did in connection with the Lee Arenas case, an entirely separate action. Does your Honor have before you Exhibit 8, which has just been received in evidence? Will you turn to page 47?

The Court: Is there any dispute as to that action?

Mr. Brett: If you will turn to page 47, which is a part of your Honor's opinion in this particular case——

Mr. Preston: Well, I think that—— [15]

Mr. Brett: May I be permitted to continue?

Mr. Preston: I would like to finish reading the question and then you can make your objection afterward.

Mr. Brett: The point is this. I understand it is always necessary, as well as proper, that an objection be made to any material included in a hypothetical question which the court has already ruled upon as not being proper matter.

Mr. Preston: The court has not ruled on this at all. It is true you indicated in your opinion you were confining your judgment to that, but the evidence in this case, both by Clark and Sallee, and the contract says he represents all the family, and they had a special understanding that they represented Eleuteria Brown at the time the Lee Arenas case was filed. It is a hypothetical question based

(Testimony of L. R. Martineau, Jr.)

upon our evidence, not the opinion of the court. The opinion of the court has been set aside. This is a new case.

The Court: Suppose we allow him to finish his question, and then you can object and move to strike any portion of it.

Mr. Brett: I simply thought I had to direct your attention to that.

The Court: That will save your point and avoid any confusion, too. Let the Judge finish his question and then you can object to any part of it, or move to strike out any portion of it.

Mr. Preston: The hypothetical question is based upon [16] our contention of what the evidence shows.

The Court: Go ahead with your question.

Q. (By Mr. Preston, continued): That the complaint in said case was prepared and filed by Messrs. Clark and Sallee on December 24, 1940, and thereafter three amended complaints were prepared and filed; that the pleadings in the case presented extraordinary difficulties because of the unusual and unique legal questions and factual situations involved;

That two trials of said action were had in the District Court, and two appeals were conducted from the judgments of said court to the Circuit Court of Appeals for the Ninth Circuit, both of which were elaborately briefed by the attorneys herein; two petitions for rehearings were prepared and filed by them; two petitions for writs of cer-

(Testimony of L. R. Martineau, Jr.)

tiorari to the Court of Appeals were prepared and filed by them in the Supreme Court of the United States, with supporting records and briefs, the first of which petitions was granted and the cause was thereupon rebriefed, heard and orally argued in the Supreme Court, resulting in a reversal of the first judgment in said case, and the second petition for certiorari was denied by said Court on June 9, 1947;

That, in addition to the foregoing work done and performed in said case in the District Court, said attorneys prepared notice of appeal to the Circuit Court of Appeals and other papers necessary to present the appeal, including the [17] following: an opening brief of 45 pages, and an appendix thereto of 6 pages, in said Court of Appeals; a reply brief of 7 pages in said court; a petition for certiorari and supporting brief of 23 pages, and a record of 78 pages, in the Supreme Court of the United States; a supplemental brief of 25 pages in said Supreme Court; two of the attorneys, Messrs. Preston and Clark, appeared and orally argued the case in the Supreme Court on March 6 and 7, 1944; following reversal of the first judgment by the Supreme Court, said attorneys filed a third amended complaint in the District Court to conform to the opinion rendered by the Supreme Court, prepared the case for retrial, and retried the case in the District Court, the evidence and exhibits comprising about 600 pages; after a judgment favorable to Lee Arenas in the District Court, the Government ap-

(Testimony of L. R. Martineau, Jr.)

pealed therefrom to the Circuit Court of Appeals, and said attorneys prepared and filed a brief for Lee Arenas containing 39 pages; thereafter said attorneys filed a petition for certiorari and supporting brief of 15 pages in the Supreme Court, seeking a review of that portion of the judgment of the Court of Appeals holding that Lee Arenas was not entitled to the allotments made to his father and brother, with a record of 676 pages and brief of 32 pages, the writ being denied on June 9, 1947.

Assume: that attorneys Preston, Clark, and Sallee made court appearances of 50 or more in number, and that the number [18] of man-days spent in office work by them in the Lee Arenas case was from 250 to 300 such days.

Assume: that the following additional work was done and performed by attorneys Preston, Clark, and Sallee in the above-entitled action of Eleuteria Brown Arenas v. United States of America, to wit:

That the time of filing said action, to wit, on the 9th day of January, 1947, the Supreme Court of the United States had not decided the questions presented by the petition for certiorari filed in said Lee Arenas case by the United States of America, and that on said date said attorneys Preston, Clark, and Sallee did not, and could not, know exactly what the Supreme Court might hold in respect to said questions, nor the effect of its future decision upon the plaintiff Eleuteria Brown Arenas, and that because thereof said attorneys were compelled to review the law deemed applicable to said action.

(Testimony of L. R. Martineau, Jr.)

Assume: that after filing said action said attorneys entered into negotiations with counsel for the United States for the purpose of making unnecessary, or of shortening, the trial of this case and that as an incident thereto said attorneys prepared and submitted to such counsel a stipulation for judgment and form of judgment; that after a delay of several months and on or about the 20th day of November, 1947, Government counsel advised said attorneys that he had been [19] directed not to enter into any stipulation for judgment, or consent for judgment, in this case, and that on or about the 25th day of November, 1947, the United States filed its answer to the complaint in this action; that this action was tried before the Honorable Charles C. Cavanah, Judge, sitting without a jury, on the 30th day of March, 1948, that evidence was introduced on behalf of both plaintiff and defendant, and the case was orally argued before the court, the trial consuming two days; that said attorneys made numerous appearances in court for other purposes.

Assume: that thereafter the said attorneys prepared and filed on behalf of the plaintiff a brief of 16 pages in reply to the questions raised in the Government's briefs; that on the 20th day of May, 1948, the court filed its decision in favor of the plaintiff, upholding the contentions made by said attorneys in her behalf, and directed said attorneys to prepare and submit findings of fact and conclusions of law, and judgment thereon.

Assume: that said attorneys did prepare and sub-

(Testimony of L. R. Martineau, Jr.)

mit findings of fact and conclusions of law comprising 7 pages and judgment comprising 3 pages, which the court signed and entered on the 23rd day of June, 1948; that on the 20th day of August, 1948, the defendant gave notice of appeal from said judgment and the whole thereof to the United States Court of Appeals for the Ninth Circuit, but thereafter dismissed its said appeal. [20]

Assume: that, while said attorneys Preston, Clark, and Sallee have not kept an accurate detailed record of the time spent in the work done by them in the course of this litigation, they estimate that the number of court appearances, other than in the Lee Arenas case, exceeded ten (10) days, and that the number of man-days spent in office work on the case, and necessary to prepare the case for trial, exceeded ten (10) days.

Assume: in respect to the experience, ability, skill, and standing of John W. Preston, the following: that he was admitted to the practice of law in the State of California in 1902; that he is licensed to practice law in all of the state and federal courts in California, and in the Supreme Court of the United States; that from his admission to the bar in California in 1902 he was engaged continuously in the general practice in said State until 1913; that in December, 1913, he was appointed by the President as United States Attorney for the Northern District of California and served as such until July 24, 1918, when he resigned to accept the office of Special Assistant to the Attorney General of the

(Testimony of L. R. Martineau, Jr.)

United States for War Work, in which capacity he served until May 15, 1919, when he resigned to re-enter the private practice of law in San Francisco; that he engaged continuously in such practice until December, 1926, when he was elected as an associate Justice of the Supreme Court of California; that in 1930 he [21] was re-elected as such Associate Justice for a full term, but resigned from the court in September, 1935, to again engage in the general practice of law; that on October 1, 1935, he was appointed, by the President, as Special Counsel to represent the United States of America in the Elk Hills oil litigation and served as such counsel until October 1, 1941, said litigation resulting in a judgment in favor of the Government for restoration of the oil lands involved and more than \$7,000,000.00 in cash, the total value of the judgment being estimated at approximately \$40,000,000.00; that during the last-mentioned period he was also Special Assistant to the Attorney General of the United States in charge of tideland eminent domain proceedings in California; that on October 1, 1941, he re-entered the private practice of law in Los Angeles, occupying a suite of offices in the Rowan Building at Fifth and Spring Streets, and at all times since has been engaged in the general practice of law at the location; and assume that he has in his employ other competent lawyers and a secretarial staff, and that his annual expense for maintaining his offices and staff of attorneys and other employees is approximately the sum of \$20,000.00.

(Testimony of L. R. Martineau, Jr.)

Assume: in respect to the experience, ability, skill, and standing of Oliver O. Clark, the following: that he was admitted to the practice of law in the State of California in 1907, and that he is licensed to practice in all of the state [22] and federal courts in California and in the Supreme Court of the United States; that he has been actively and continuously engaged in the general practice since his admission to the bar in 1907, and has engaged in the trial of contested cases in the courts of most of the western states, except the states of New Mexico and Colorado, and has specialized in the trial of cases for and under employment by other lawyers.

Assume: in respect to the experience, ability, skill, and standing of David D. Salle, the following: that he was admitted to practice law in the State of Kansas in 1906, and there became familiar with Indian litigation; that he has specialized to some extent in corporation law, and in the reorganization and financing of corporations; that he removed from Kansas to California in 1909, and was during that year admitted to practice law in California; that ever since 1909 he has engaged in such specialized practice and also in the general practice of law in said state.

Assume: that the property judicially allotted in this case to the plaintiff Eleuteria Brown Arenas has a market value of three hundred thousand dollars (\$300,000.00).

(Testimony of L. R. Martineau, Jr.)

Now, assuming all of the facts stated in this question, do you have an opinion as to what is the reasonable value of the legal services rendered by Messrs. Preston, Clark, and Sallee, in conducting the litigation which resulted in the judicial allotment of said lands to the plaintiff and a [23] judicial declaration of her right to a trust patent thereto?

Mr. Brett: If the Court please, I object to and move to strike the following portions of the heretofore-stated hypothetical question on the ground that, as to the first of the matters, this court has ruled, and it is the law of the case, that such matter is not proper to be considered in fixing the value of services in this particular case, and I refer to the services in connection with the Lee Arenas case.

Second, that the court may take judicial notice that the trial of this particular cause, and I refer to the original cause in which the issue of the right of Eleuteria Brown Arenas to a trust patent was involved, did not involve two days, but involved but one day, to wit, Tuesday, March 23, 1948, as shown by the official original reporter's transcript of the proceedings of that date which are reported in a total of 39 pages.

My objection and motion to strike on the first part is directed to that portion thereof which directed the witness' attention to the work done and performed by these three petitioners in an entirely separate and different case, and under an entirely separate and different written contract with another

(Testimony of L. R. Martineau, Jr.)

Indian, Lee Arenas. On that point, I direct your Honor's attention to the fact that in your Honor's opinion filed in the previous proceedings in this case, and now appearing on pages 47 and 48 of the printed transcript [24] of the record on appeal, which has been received as Petitioners' Exhibit 8, the court said in part as follows:

"In approaching the consideration of this question"—referring to the reasonable attorneys' fees and expenses—"the court is confined to the extent of the services rendered by petitioners in the preparation and trial of the present action, as disclosed by the evidence, for it will be remembered that the primary question here, as to the right of an Indian to an allotment under similar circumstances, was litigated and determined in the case of *Lee Arenas v. United States*, supra, and the District Court in that case has allowed petitioner an attorney fee of an interest of 22½ per cent of the allotment there involved and impressed a lien thereon."

The court there expressly excluded the right to consider the work in that other case.

I also direct your attention to the fact that in the pleadings in this particular case, the United States and Eleuteria Brown Arenas specifically admit that she was entitled to the trust patent if she could show one of two things: either that she had been adopted by Lee Arenas, or that there was a legal manner in which someone else could act for her; insofar as her rights otherwise were concerned, it was ad-

(Testimony of L. R. Martineau, Jr.)

mitted in the answer of the United States and [25]
in the answer of Eleuteria Brown Arenas.

Your Honor will also recall that very shortly after the trial a communication was addressed to your Honor, which is in the records and files in this case, in which, it having come to the attention of counsel for the Government, that there was an instruction authorizing this man, Wadsworth, to make a selection, the Government then conceded judgment, because it had conceded all other matters.

Under those circumstances, I respectfully submit, including in this hypothetical question and asking this witness to include as one of his questions of fact the work which these counsel did in an entirely separate proceeding, and for which they are to be compensated in an entirely different proceeding before another court, is not a proper and lawful matter to be considered in this proceeding.

The second matter is the hypothetical question directed the witness to consider two days trial time were required in this proceeding. As I said, the official transcript of the proceedings in the case involving the trust patent shows that that hearing before this court on the trust patent issue was a partial one-day hearing on Tuesday, March 23, 1948, which was reported in a total of 39 pages of the reporter's transcript.

Mr. Preston: We will look at the minutes of the court on that. You haven't considered the minutes of the court. [26]

The Court: Those are your two objections?

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: Those are the two objections.

The Court: What have you to say?

Mr. Preston: Your Honor, here is our position. This Eleuteria Brown Arenas took the name of Arenas and was in his family and lived as a member of his family. The deposition of Mr. Sallee and the deposition of Mr. Clark both say that the contract with Lee Arenas at the time they were first employed embraced the taking of her case along with the other case, the test case. There wasn't any use of putting two cases up to make a test case. We had the case on hand. The contract made with Lee Arenas refers, in my opinion, to this very situation, because it contains a clause that he is to represent the family, and she was at that time a member of the family. Of course, he signed as her father, if you will remember, at the time of the allotment proceeding, and counsel objected, and later on we found written authorization for him to represent her.

When we put up the hypothetical question, your Honor, we have a perfect right to assume that the evidence shows that the Lee Arenas case was a test case, and we had this case on hand, as well as the cases of all the other Indians, at the same time.

It isn't fair to say that the Lee Arenas case comprises all the service for which we are entitled to be paid, because [27] this case is connected with it and a part of it. I am asking him simply to assume that this case was allied to and came on at the time of the Lee Arenas case. I think it is perfectly

(Testimony of L. R. Martineau, Jr.)

proper for him to express an opinion based on that, even though your own opinion, at the time you wrote the opinion, was that we couldn't consider it. You may reconsider it after looking at this case.

Every court has the right to reconsider its ruling in the matter of what is to be considered and what is not evidence.

Mr. Brett: I don't know that I can find the material I want as quickly as I would like, but I would say to your Honor that the record of the testimony of David Sallee and Oliver O. Clark, which is in the transcript which has been received as Exhibit 8—

Mr. Preston: It is in the depositions.

Mr. Brett: Both show, at the time the contract of Eleuteria Brown Arenas was signed, she was living separate and apart and in another residence. She had a child. At least, she had been married. I don't know whether she was married at that particular time. It also contains an express statement—I will find it in a few minutes—by Judge Preston in which he conceded that the contract was a general term of contract to cover various Indians and that the use of the word “family” there did not apply to Eleuteria Brown Arenas and they did not so consider it or urge it. [28]

As the court's opinion shows and as this court can take judicial notice of, those other proceedings were the subject matter of an entirely different case, and a very substantial award was made.

It is true that, like this case, it is subject to

(Testimony of L. R. Martineau, Jr.)

further consideration in fixing it in money, but I can't believe that this court is going to assume that that trial judge is not going to consider that it was an important case and that they are entitled to very substantial fees, having once done so and likewise fixed a percentage.

I submit that under the circumstances of this case, where this employment was after the work had been completed and was under an entirely separate contract, it would not be proper for this court to award double compensation for the same services, which is what would be done if you did that here.

This very witness, as he has stated on his voir dire, testified in the other case and gave his opinion as to the value of those services.

I submit it would be unfair and unjust and improper to have him consider and award additional fees or duplicate fees to these peititoners for the same services in this proceeding.

Mr. Preston: I am not asking for any duplicate fees. We are only asking that it be considered that this case had its roots in the Lee Arenas case, that it was on hand at the [29] time, had consideration at the time, and it was kept in consideration from that time on until the case was started and tried.

I think it is perfectly fair to do that. Suppose we had a dozen cases and you pick up one of them. You don't take your services in just one case. You take your services in the whole field covered by the situation at that time.

(Testimony of L. R. Martineau, Jr.)

As for the contract signed by this woman, that was a later case. There wasn't anything said about that and that has no place in preparing what we are talking about here. The Lee Arenas case refers to the family.

Sallee and Clark both say in the deposition before you, it was understood the Brown case would wait until we tried the other. I think it is akin to it, it is connected with it, and some value should emanate from this situation, in addition to the ordinary case as if we were employed after the Lee Arenas case.

Mr. Brett: May I be heard briefly?

Mr. Preston: You have been heard before. I get the last say.

Mr. Brett: I want to point out another thing. In the answers filed on this trust patent case, as I understand it, what your Honor is now here intending to do, is required to do under the mandate, is to fix the fees of the three attorneys who are petitioners in this particular patent case, [30] that is what they are asking the lien for—the answer filed, and I am reading from the answer itself:

“Defendant denies the allegations contained in paragraph VI of the plaintiff's complaint, but admits that if plaintiff can establish that on and after January 8, 1927, she was a member of the Palm Springs Band of Mission Indians; that she was then and now is the adopted daughter of Lee Arenas; that the selections of the lands described in paragraph III of plaintiff's complaint were

(Testimony of L. R. Martineau, Jr.)

chosen and made by someone authorized to act for and in behalf of the plaintiff (who was then a minor and who was then incompetent to make such selection in her own behalf) prior to May 9, 1927, then plaintiff has done and performed everything that she could do and which the law then required her to do as a condition precedent to obtaining a trust patent under the provisions of Title 25, U.S.C., Section 345, Stat. 760, under the principles established in the final decisions in the cases of *Arenas v. U. S.*”—and so forth—“and that by reason thereof, plaintiff has become entitled to the issuance to her, in the manner provided by law, of an allotment trust patent in severalty to the lands described as Parcels (a), (b), and (c) in paragraph III of plaintiff’s complaint, effective as of and to commence [31] to run from May 9, 1927, but that, failing proof of such condition precedent, she is not entitled thereto.” [32]

Mr. Preston: What has that got to do with this case? Not a thing in the world.

Mr. Brett: Just a minute, Judge.

Mr. Preston: You have been over it once or twice already.

Mr. Brett: In the reporter’s transcript in the trust patent case, Judge Preston made this statement, on page 34, and I think the court will remember it:

“Mr. Preston: This is the first time I have ever tried a case where everything was admitted in the answer except a few things.”

(Testimony of L. R. Martineau, Jr.)

Those were whether she was adopted and someone else had to make a selection for her.

Mr. Preston: What value has that to the question?

Mr. Brett: The record also discloses when it was discovered, not at the trial, it was not offered at the trial, counsel didn't have it before them, and counsel for the Government didn't know about it, it was clearly apparent, but after we had started writing briefs and submitted them to your Honor, counsel for the petitioners discovered there was existing a direction to this special authorized agent which authorized him to make a selection for orphans or those not adopted, and the Government stipulated with counsel and the court approved a stipulation be filed in which a copy of that authorization be filed, and when that was done, the writer, as one of the counsel for the respondent, directed a [33] letter, and the original was filed in the case, to your Honor at your residence in Boise, Idaho, because at that time you had returned, dated May 3, 1948, in which the Government then expressly confessed that in the light of that subsequently discovered evidence, that Wadsworth had an authorization to make a selection, Eleuteria Brown Arenas was entitled to a trust patent.

Mr. Preston: What has that got to do with this?

Mr. Brett: The confession that she was entitled to a trust patent if she was either adopted or someone else had the right to make a selection, the

(Testimony of L. R. Martineau, Jr.)

determination after the trial, or the determination that such a right existed, and the immediate concession by the Government that she was then entitled to judgment on the trust patent, would make it unjust and unfair to have this court consider, in such a short proceeding, since that was practically all we touched on, since that was conceded, with this bit of evidence, all those matters which are attempted to be brought out here.

Mr. Preston: Am I going to get through this time or are you going to answer it again?

What he has said about finally conceding that Lee Arenas had the right to make, to select an allotment for Eleuteria Brown Arenas, is true, but it came after the case had been submitted and briefed, and we happened to discover it ourselves. Then it was admitted. It is true they yielded at [34] that time, but they fought every inch of ground up to that point.

I have this suggestion to your Honor in this matter here. Let the witness answer the question as put, and then eliminate the Lee Arenas case, and he can answer that. If he does, it will be all right with me. Then you will have it both ways before you.

We are entitled to have this question answered, because our testimony shows that it was a part of the Lee Arenas case in the beginning. We are entitled to all of that, we think, but if the court disagrees with us, we can have the testimony both ways. Let him answer the question as put and then

(Testimony of L. R. Martineau, Jr.)

eliminate that part, and if he can answer it, it is all right with us.

The Court: Are you through?

Mr. Preston: As far as the days in court are concerned, the minutes of the court will show whether it is one day or two days.

Mr. Brett: Did you ask if I was through?

The Court: Yes. I want to know if counsel are through, so I can make some ruling.

Mr. Brett: I am through, yes.

The Court: The court realizes that under this objection made by the counsel for the Government, we have here presented services rendered in two cases. One involves a case in which [35] the services of the attorneys are to be fixed, which is now pending in another court.

Mr. Brett: Yes, sir.

The Court: Under the mandate of the Circuit Court of Appeals which I am here now trying to consider, when we had this matter before this court as to the amount of the reasonable value of services for attorneys' fees at that time, we proceeded on the theory of the valuation of the allotment and fixed a percentage amount of whatever it may be. The Court of Appeals said that this court now has to fix the value of the reasonable attorneys' fees in dollars and cents, fix a definite amount.

We realize that there are some services rendered in these two separate cases. In the main case, which went to the Supreme Court of the United States, the fees, attorneys' fees, are still pending before

(Testimony of L. R. Martineau, Jr.)

another district judge here on a similar mandate from the Court of Appeals.

Now, is this court to undertake to fix the amount of attorneys' fees for services rendered in that case? The court over there will have to fix those attorneys' fees. There is likely to be a duplication to some extent in presenting to the court evidence that the court would have to listen to here and determine a definite amount of attorneys' fees in dollars and cents. Now, we have to consider the mandate of the Court of Appeals. That is the confusion you [36] would get into if the court tries to consider services in both those cases in fixing attorneys' fees in this case, which is separate.

I think I should let the question stand, with the reservation of ruling, either sustaining your objection or overruling it, in considering this separate case or not considering it. I will rule upon that at the close of the case, as to whether I should or not.

I can appreciate where we have got two cases still pending. In fixing the attorneys' fees, which involve, of course, the services that enter into both, to a certain extent, the main case went to the Supreme Court and that is still pending as far as fixing the attorneys' fees is concerned under the mandate of the Court of Appeals. I have to watch so there won't be a duplication here where you are going to be taken care of in fixing attorneys' fees in the main case, the one allowing the trust patents, and you were the attorneys in that case.

(Testimony of L. R. Martineau, Jr.)

Then, if I would allow it and the other court would allow it, there might be a duplication to a certain extent in fixing a definite amount of attorneys' fees in dollars and cents. That is the confusion we have here.

So I think this court should allow the witness to answer the question presented, reserving the right to rule upon your motion to eliminate what you claim covers your objection. [37] Then we won't have to go over it again.

So that will be my ruling for the present. You may proceed.

Q. (By Mr. Preston): Are you ready to make an answer? A. I am, sir.

Q. What, in your opinion, is the reasonable value of the legal services if it be assumed that said property has a market value of \$300,000.00?

A. \$75,000.00.

Q. If you were to assume it had a market value of only \$200,000.00, have you figures on that?

A. In my opinion, a reasonable fee would be \$55,000.00.

Q. And if it went as low as \$100,000.00, what would be your opinion?

A. I think the fee should be at least \$30,000.00 and perhaps more, in order to be reasonable.

Mr. Preston: Cross-examine.

(Testimony of L. R. Martineau, Jr.)

Cross-Examination

By Mr. Brett:

Q. Now, Mr. Martineau, you have considered as one of the factors, in stating the opinion which you have just stated, the services which the three petitioners rendered in the various proceedings heretofore described by Judge Preston in his hypothetical question, in arriving at the final determination in the Lee Arenas case, Case 1321? [38]

A. Yes. And if I may explain, I have considered a good many more matters than Judge Preston brought out on my direct examination.

The Court: You are to tell me what you are testifying to, not something you are retaining in your mind.

The Witness: I beg your pardon.

Mr. Brett: I didn't hear the ruling of the court.

Mr. Preston: I didn't either.

The Court: He said he considered a lot of matters you didn't bring out in your question. I want to know what they are.

Mr. Preston: Yes, I think so.

The Court: I don't want something he has in mind.

Mr. Preston: Shall I take him to ask him what they are?

Mr. Brett: I assume that would be part of the direct, or I can cross-examine him.

Mr. Preston: I thought you would cross-examine him thoroughly and you would get it all.

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: You may proceed.

Mr. Preston: No. I am not wanting to proceed.
Go ahead.

Q. (By Mr. Brett): Then you did consider the services rendered in Case 1321-O'C, which is the Lee Arenas case? A. I did.

Q. Would your opinion of the value of the services be [39] different if you had eliminated those considerations entirely? A. It would not.

Q. Did I understand you read the record in this particular case?

A. I read such of the record, Mr. Brett, as was submitted to me. I don't know whether I read the record as we define it, as certified by the clerk to go to the Circuit Court of Appeals in the matter. In other words, I am not certain that all documents have been submitted to me, because you remember that the record contained a good many items on pleadings and otherwise that may not appear in the transcript. I don't know. There were many orders, and so forth.

In other words, I haven't made a study of the procedural aspects of the record, not deeming them to be material.

Q. Do I understand, when you describe the matter as procedural aspects, that you refer to the reporter's transcript of the proceedings in the trial? You did not consider that?

A. If you will show me what you are referring to, I think, Mr. Brett, I can answer your question.

Mr. Brett: May the record show that I am hand-

(Testimony of L. R. Martineau, Jr.)

ing to the witness a document entitled "Reporter's Transcript of Proceedings, Los Angeles, California, Tuesday, March 23, 1948," pages 1 to 39, inclusive.

The Witness: The answer to your question is yes, that [40] was submitted to me by Judge Preston.

Q. Did you consider the pleadings that had been filed by the respective parties in respect to the issue of the right of Eleuteria Brown Arenas to a trust patent? A. I did.

Q. Did you consider the supplemental stipulation which was entered into between the Government and the petitioning attorneys, in which it was stipulated, following the trial and submission to the court, that an exhibit be permitted to be filed, which disclosed that the Commissioner of Indian Affairs had authorized the Special Allotting Agent Wadsworth to make a selection for minors and for orphans? A. I did.

Q. And did you consider the communication from counsel for the Government directed to the Honorable Charles C. Cavanah, Boise, Idaho, dated May 3, 1948, in which the Government conceded that Eleuteria Brown was entitled to her trust patent?

A. I think I never saw that letter or communication to Judge Cavanah at Boise. I heard you refer to it in your argument for the first time this morning.

Q. Well, if you would assume that in the pleadings filed by the respondents to the issues involving Eleuteria Brown Arenas' right to a trust patent,

(Testimony of L. R. Martineau, Jr.)

it was conceded she was entitled thereto if she could show one of two things, or [41] both, that is, that she had been adopted by Lee Arenas, or, if not adopted, that someone else had been authorized to make selections for her, would that——

Mr. Preston: Are you through?

Mr. Brett: No.

Mr. Preston: I wish to object to that question, if your Honor please, this line of examination. The facts are that this Government took an appeal after your decision, absolutely took an appeal, and after we had whipped them, they had filed briefs and denied the adoption, denied the selection, denied the power of Lee Arenas to make a selection; then, when we found these documents, he yielded at the end of the last step, he couldn't go any further. They actually appealed this case, and filed a notice of appeal, after your decision. It is not fair to try to get the record in any such form as they want. The witness has testified from a hypothetical state of facts, and to cross-examine him about what he considered elsewhere is really not germane to the issue, anyhow.

Mr. Brett: I hadn't finished my question, but if the court wants to rule on it before it is finished, all right.

The Court: Go ahead and finish your question.

Q. (By Mr. Brett): If you would assume, as a part of the hypothetical question, first, that in the pleadings filed by the respondent Indian and by the Government in her behalf, [42] it was conceded

(Testimony of L. R. Martineau, Jr.)

that she was entitled to the relief prayed for in the complaint if she could show one or both of two things, to wit, that she had been adopted by Lee Arenas, or that someone else was authorized to make a selection for her, she then being a minor, and if you would further assume that in the hearing and during the entire period thereof until submission to the court no record was offered or received in evidence on behalf of the petitioners that any person would have authority to make selection for her, the only issue therein being the question of whether or not she had been adopted; and if you would assume that subsequent to the submission to the court upon that issue petitioners discovered and submitted to the respondents a written communication which disclosed that the Special Allotting Agent did have an express authorization from the Commissioner of Indian Affairs to make selections for orphans or for minors, and that upon receiving that the Government stipulated with petitioners that such document be received in evidence as though offered during the trial; and that thereafter the Government by communication to the trial judge, the Honorable Charles C. Cavanah, informed him that the Government conceded that the petitioner, the Indian, Eleuteria Brown Arenas, was entitled to the relief prayed for in her complaint;

That the total proceedings in trial took less than one day;

(Testimony of L. R. Martineau, Jr.)

And assume that subsequent thereto the Government took what is termed a protective appeal until the matter could be submitted to Washington, and then dismissed it within a week, before any other proceedings were taken, any other record prepared or filed, except the notice of appeal;

Would that change your opinion as to the reasonable value of the services rendered by the petitioners in this proceeding?

Mr. Preston: I object to the question as too involved to enable anyone to make an intelligent answer.

The Court: After all, the primary question here on this proceeding is, What was the extent of the services rendered by the attorneys for the petitioner up to a certain time?

Mr. Brett: Yes, sir.

The Court: That was presented to this court and ruled upon, and then an appeal was taken by the United States. Thereafter, you concluded to withdraw the appeal.

The question is, What was the extent of the services rendered by counsel up to that time? The mere result of the case as to the United States, the Government, withdrawing their appeal, goes to the question of what was the final determination of the case. It doesn't affect the amount or extent of the services rendered by counsel up to that time. That is the question here involved, not what was determined afterward by some appellate court or by one of the parties withdrawing the appeal, which was

(Testimony of L. R. Martineau, Jr.)

done, as you say, in a [44] letter addressed to me when this case was under advisement.

That doesn't affect at all or reduce the services rendered by petitioners, the mere fact that the Government withdrew their appeal after that time. That is what I am going to have to consider here under the mandate from the Court of Appeals.

Mr. Preston: And, furthermore, before we found these two letters, why, we had gone through all the agony of presenting the case and briefing it and everything else.

The Court: You propounded to the witness the facts up to the time you rendered all the services you are now claiming for. The result of that is——

Mr. Brett: Your Honor, I intend to interrogate the witness more specifically, but I think I am entitled to an answer to that question, as to whether it would change his opinion.

The Court: It doesn't affect the services they rendered. I will let him answer.

Mr. Preston: If he can answer it, all right.

The Court: You may answer. Are you all confused now? Let the reporter read it.

The Witness: It is difficult to get me confused after this many years at the bar. I think I understand the question that Mr. Brett has propounded.

The Court: Very well.

The Witness: Upon the assumption that these various [45] concessions had been made by the Government, which he enumerated in his question, and the ultimate disposition of this case, which was

(Testimony of L. R. Martineau, Jr.)

taken on appeal by the Government and by them dismissed, his final inquiry is as to whether or not my opinion as to the value of the services rendered in this particular case, this Eleuteria Arenas case, would be in any way modified if I made the assumption propounded by Mr. Brett.

Do I have the substance of your inquiry?

Q. (By Mr. Brett): I think you do. The inquiry is, Would those circumstances modify your opinion in any respect as to the reasonable value of the services?

A. They would not in any way modify the extent of the value under a quantum meruit of the services rendered in this particular proceeding we have here this morning, for the reason that, first of all, I wish it definitely understood that, as a member of this bar, I would be as much opposed as his Honor or you or Judge Preston to any duplication of fees, but I must say to you, in explanation of my answer, that one cannot take the particular proceeding which we have here this morning and not take into consideration the factors that I mentioned earlier, which have not been brought out on my direct examination, namely, the history of this entire litigation, together with the allied cases, and the duty of Judge Preston, Mr. Clark and Mr. Sallee, as attorneys for this particular Eleuteria Arenas this morning, or Lee Arenas, [46] or any other individual, in order to arrive at what I consider substantial justice.

(Testimony of L. R. Martineau, Jr.)

Under those circumstances, one has to take into consideration the factors which were not only disclosed by the decisions of the courts, which I read, and which are alluded to in the Federal Reporter, as well as in the Supreme Court of the United States, but they are also referred to, in part at least, or certain decisions are referred to, in the memorandum which has been presented to his Honor this morning regarding the matter here in issue.

Those are the matters, and those are the only matters, if the Court please, as to which I had not disclosed the factors which I considered as existing before giving the definite figures which I submitted in answer to Judge Preston's question.

Mr. Preston: Now, Mr. Martineau, let's fix the——

Mr. Brett: Your Honor, may I have your permission to examine the witness on the matters involving the Lee Arenas case and still reserve my objection? Your Honor hasn't ruled, and if you should rule against me, it would be proper to cross-examine, but I don't want to bar myself by examining on those matters, so I ask your permission, in view of the fact that you have not ruled.

The Court: Go ahead. You may do so.

Q. (By Mr. Brett): First, in reference to Case 1321—— [47]

A. Which case do you mean?

Q. The Lee Arenas case. A. All right.

Q. In the Lee Arenas case, you learned that at

(Testimony of L. R. Martineau, Jr.)

the time that this proceeding was instituted, all briefs had been filed in the Supreme Court of the United States in connection with the petition for certiorari, is that your recollection?

The Court: Would you please read that question.

Q. (By Mr. Brett): Is it your recollection, as a part of your study of the work that these petitioners did in connection with Case 1321-O'C, which is the original Lee Arenas case, that when this particular complaint for a trust patent was filed in this present Action 6221, all of the briefs by these petitioners in the Supreme Court had already been prepared and filed; is that your recollection?

A. My recollection is that when I testified in the Lee Arenas case concerning the reasonable value of services in that case, I had read the transcript and the briefs which had then been filed. I do not know whether that answers your question, Mr. Brett, or not.

Q. It does not, Mr. Martineau. My question is a matter of this. You have stated, as I recall your direct examination, and in connection with the hypothetical question upon which you gave your answer of value——

A. That's right. [48]

Q. ——that you considered the work which was done by these petitioners in the Lee Arenas case and had read all the briefs and had read the decisions, both antecedent to the final decision in that case and

(Testimony of L. R. Martineau, Jr.)

the various decisions in that case. Is that not a correct resume of what you testified?

A. That is true, if you will define the word "considered." Otherwise, not.

Q. Would you tell the court, please, because I don't know what you meant by the word "considered." What did you mean?

A. Do you want a definition of the word "considered" or do you want me to explain what I meant?

What I meant, Mr. Brett, was that obviously I took into consideration the fact that Judge Preston, Mr. Clark, and Mr. Sallee had done a very large amount of work in connection with the Lee Arenas case.

In considering the large amount of work they did, I correspondingly made my answer to the Judge's hypothetical question to me on direct examination much less than it otherwise would have been, for the reason that I do not believe that there should be a duplication of fees to any attorneys for like work. I consider that they were better prepared than any three lawyers I would know to take up the case which we have here before us this morning. [49]

So, in considering this case just on its own feet, having considered or thought about the work they had done previously, I did not use that as a factor in any other way than I have just described.

Q. Mr. Martineau, on a few occasions I have found it necessary to be a witness, and I realize

(Testimony of L. R. Martineau, Jr.)

there are difficulties in a lawyer being a witness. I want you, if you can, please, to answer me specifically on a couple of points.

One, as a part of your consideration in giving your answer as to value, was it your belief that at the date the complaint was filed in this particular case, all of the briefs filed by these petitioners in the Supreme Court of the United States in the Lee Arenas case had already been prepared and filed?

A. In view of my recollection of the chronology and of the time that the Lee Arenas case was heard here before Judge Mathes, my idea is that the substantial work which was done in the case now before us may have been done subsequently, so far as the preparation of briefs is concerned.

Q. Maybe I can aid you a little.

A. I don't believe, Mr. Brett, if I may be permitted as a lawyer to say so, I need any aid. All I am trying to do is state what I believe to be the truth.

Q. What I am trying to say is this, Mr. Martineau. When I refer to the work being done in a brief filed in the [50] Lee Arenas case, I am referring to that portion of the Lee Arenas case which was stated in the hypothetical question to you and which related to the final adjudication that Lee Arenas was entitled to a trust patent. I am not referring to the ancillary proceeding before Judge Mathes in which the petitioners, as here, were seek-

(Testimony of L. R. Martineau, Jr.)

ing in that petition to recover fees and to enforce their rights to fees. A. Yes.

Q. With that understanding in mind, did you believe and assume as a part of your assumptions in answering this hypothetical question that when the complaint was filed in this case for Eleuteria Brown Arenas by these three attorneys, that they had already prepared and had already filed in the Supreme Court all of their briefs and authorities which involved the trust patent issue in the Lee Arenas case, with the Supreme Court of the United States? You can answer that yes or no, please.

Mr. Preston: Just a moment. The hypothetical question ought to be read to him at that point.

The Witness: I have it before me.

Mr. Preston: Page 5, line 13:

“That at the time of filing said action, to wit, on the 9th day of January, 1947, the Supreme Court of the United States had not decided the questions presented by the petition for certiorari filed in [51] said Lee Arenas case by the United States of America, and that on said date said attorneys Preston, Clark, and Sallee did not, and could not, know exactly what the Supreme Court might hold in respect to said questions, nor the effect of its future decision upon the plaintiff Eleuteria Brown Arenas, and that because thereof said attorneys were compelled to review the law deemed applicable to said action.”

The hypothetical question doesn't say anything about whether the briefs were all in or not. I don't

(Testimony of L. R. Martineau, Jr.)

understand that is a proper question, and if it is, and if he knows whether the briefs were in or not, he knows more than I do. I don't know.

Mr. Brett: I think on cross-examination I am entitled to elicit all the consideration that the man gave.

Mr. Preston: It won't do you any good.

Mr. Brett: He can answer whether he believed one way or another, your Honor.

The Court: He may answer.

The Witness: I have no knowledge of when the briefs filed by other attorneys were filed or whether the briefs to which you allude were all filed or not. The answer, therefore, is no, I don't know whether they were or were not filed.

The Court: You have answered the question now. Go [52] ahead.

Q. (By Mr. Brett): The second question is this. Is it true that you have consulted with these petitioners, have examined their briefs and records, and that you came to the conclusion as to whether or not they had made complete preparation at the time they filed this Eleuteria Brown Arenas suit for the work which was to be done in the Lee Arenas case, or is it not true?

Mr. Preston: I don't understand that question. May I have that reread, please?

(The question was read by the reporter.)

Mr. Preston: Whether the work in the Lee Arenas case was finished or not? Is that what you mean? Why don't you ask him a simple question?

(Testimony of L. R. Martineau, Jr.)

Mr. Brett: I will make it simple.

Q. Did you believe, in fixing this value, that these attorneys would have to do additional preparative work in the way of briefing and other work necessary to an appeal on the issue of whether or not this Indian or Lee Arenas was entitled to a trust patent at the date that this complaint in this action was filed?

A. Certainly not. I confined my answers to the hypothetical question put to me.

Q. If I understand your answer correctly, you then believed, as far as that issue was concerned, these attorneys [53] were completely prepared and had familiarized themselves with the law, as far as they could?

Mr. Preston: Just a minute. We object on the ground it is contrary to the opinion in the hypothetical question. The hypothetical question says they had to review the law before they filed the Eleuteria Brown case. The question is the antithesis of that.

Mr. Brett: My question is what he has just answered, which is proper on cross-examination.

The Court: You may answer.

The Witness: Would you read the question?

(The question was read by the reporter.)

Q. (By Mr. Brett): In reference to the right of these Indians to a trust patent?

A. No, I didn't believe that.

Q. Well, now let's very briefly go over the issues that were involved in the Lee Arenas case.

(Testimony of L. R. Martineau, Jr.)

You are familiar with those issues, are you not?

A. I was familiar with them.

Q. Are you still familiar with them?

A. Insofar as my recollection is good.

Q. The issue in that case then involved these factors: one, whether said selections made by a Special Allotting Agent in 1923 were enforceable or not——

Mr. Preston: No, 1923 and 1927. [54]

Mr. Brett: If the Court please, Judge Preston has practiced a long time and so have I. I don't think it is fair to interrupt me.

The Court: Go ahead.

Mr. Preston: He has no business assuming things to be facts if they are not facts.

The Court: Just a minute. You may correct that when he gets through, Judge Preston. Go ahead.

Q. (By Mr. Brett): Do you understand the question?

A. I would like to have the question repeated, because you are asking for a date over 20 years ago.

Q. Now, Mr. Martineau, you understand that the Lee Arenas case, 1321——

A. Yes.

Q. ——which was referred to in the hypothetical question, is the case which was commenced in 1940, reaching the Supreme Court, and it had a final decision there in 1944, do you not?

A. I am familiar with that case.

Q. You are familiar with the fact that in the Supreme Court there was a review under certiorari

(Testimony of L. R. Martineau, Jr.)

of the decision of the Circuit Court of Appeals of the Ninth Circuit? A. Yes.

Q. You are familiar with the fact that there were [55] several issues which were involved in that review? A. Yes.

Q. One of the issues was the question of whether or not the 1923 selections for allotment made for Lee Arenas by a Special Allotting Agent were valid and enforceable.

A. I am familiar with the fact that one of the issues involved the validity of those allotments.

Q. All right.

A. Whether that be dated 1923 or 1927, or whatever date it is.

Q. All right. Are you familiar with the fact that on that particular issue the Court of Appeals had determined that the 1923 selections were not valid?

Mr. Preston: At what time is this?

Mr. Brett: That is when it was on review before the Supreme Court under certiorari.

The Witness: In what case?

Q. (By Mr. Brett): In the Lee Arenas case.

A. I am familiar with the decision of the Circuit Court of Appeals in the Lee Arenas case. I am not certain about your 1923 date, Mr. Brett.

Q. Are you familiar with the fact that the second issue there was whether or not the 1927 selections made by a Special Allotting Agent for Lee Arenas were valid?

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: Which case is this, now? The first appeal [56] or the second? The first certiorari or the second?

Mr. Brett: It is the first certiorari. No, I am referring to the second certiorari.

Q. Are you familiar with the fact that another issue was whether or not the 1927 selections for allotment by a Special Allotting Agent for Lee Arenas were valid?

A. I am familiar with that.

Q. And the issue before the Supreme Court was whether or not the Court of Appeals had correctly decided that issue by holding that they were valid insofar as Lee Arenas and the deceased wife of Lee Arenas were concerned?

A. That's right. The best record is the opinion of the court.

Q. Are you familiar with the fact that at that time, which was in 1944, the Supreme Court had already decided in the first certiorari proceeding, the first appeal, that an act of Congress was a mandatory direction to the Secretary of the Interior to make those particular allotments?

Mr. Preston: I object to that on the ground that is not a correct characterization of the opinion. The opinion was that it was the duty to make allotments in general, but not specific.

Mr. Brett: I will amend my question.

Q. Are you familiar with the fact that upon the first appeal the Supreme Court had decided that an act of Congress [57] had made it mandatory that

(Testimony of L. R. Martineau, Jr.)

the Secretary of the Interior make allotments in severalty, that is, allotments in trust patent in severalty, to members of the Palm Springs Band of Indians?

The Witness: As a member of this bar, I submit counsel's question asking me to give my opinion concerning his characterization, or whether I am familiar with his characterization of a written opinion which I have in my library, is unfair to me as a witness. If counsel will come at this thing from a point of view that will enable me to discriminate between the amount of work done in the one case and in the other, I could very quickly shorten the proceeding, I think, for him, because I don't think Mr. Brett and I have any animus or ill will toward each other. We are trying to arrive at a record here. I submit, therefore, that it is not within my duty as a witness to try to characterize what can be so readily read by any member of the profession. Therefore, I submit, for me, as a special privilege, if the Court please, this line of questioning is unfair to me or to any other lawyer who might be called in my stead.

Mr. Brett: If the Court please, I have the greatest regard for Mr. Martineau, and no animus. I think my questions are proper, but in order to make time, I will proceed to something else.

May I ask the bailiff to bring me 322 U. S., please? [58]

The Court: Go ahead.

Q. (By Mr. Brett): Mr. Martineau, as a part

(Testimony of L. R. Martineau, Jr.)

of this hypothetical question, your attention was directed to this work upon the part of these three petitioners in the second appeal before the Supreme Court, to wit, the petition for certiorari—I will have it here in a minute, and I will read the text of it and you will know what I mean. Page 4, line 31:

“Thereafter said attorneys filed a petition for certiorari and supporting brief of 15 pages in the Supreme Court, seeking a review of that portion of the judgment of the Court of Appeals holding that Lee Arenas was not entitled to the allotments made to his father and brother, with a record of 676 pages and brief of 32 pages, the writ being denied on June 9, 1947.”

Are you familiar with that part?

Mr. Preston: I am willing that part of it go out of the question.

The Witness: Will you specify the lines you wish to have go out, then?

Mr. Preston: What page is that on?

Mr. Brett: Page 4, line 31, beginning with the word “Thereafter,” and ending “on June 9, 1947,” page 5, line 4.

Mr. Preston: I am willing that go out. [59]

Q. (By Mr. Brett): In view of that concession, as an experienced trial lawyer and one experienced in briefs, would you not say that in itself was a substantial part of the work of this counsel, to prepare a petition for writ of ceritiorari in the Supreme Court, to go over a record of 676 pages and to prepare briefs in an endeavor to set aside the

(Testimony of L. R. Martineau, Jr.)

decision of the Circuit Court of Appeals of this circuit?

Mr. Preston: That is the Lee Arenas case, and I am willing it go out, and if it lessens the value of the services, all well and good.

The Court: He asks that that be eliminated now.

Q. (By Mr. Brett): Then you eliminate that phase from your consideration of the services that they rendered.

A. Certainly, by stipulation of counsel, but I wish to explain the answer.

The Court: You have answered the question. Go ahead.

Q. (By Mr. Brett): You state, Mr. Martineau, among other things, you considered also the opinion of the Supreme Court of the United States filed in March, 1944, in the first Arenas appeal, and which is reported in 322 U. S., commencing at page 419. I will show you the book.

The Witness: By leave of court, I would like to say part of this discussion between me and Mr. Brett arises out of apparently a difference of opinion between Mr. Brett and myself as to what I considered. When you attempt to determine [60] what a man considered, you are off in a metaphysical realm of some sort. It may involve a great many things, the law of this land, the law of this State, the law of the Supreme Court, Canon 12 of the American Bar Association, with specifies the factors, as I prefer to call them, which are involved in the determination of a fee. That is the basis for

(Testimony of L. R. Martineau, Jr.)

the prolonged examination here, if the Court please.

I am familiar with this case in 322 U. S., commencing at page 419.

Q. (By Mr. Brett): Before I examine you on that opinion, there is something that occurred to me and I don't want to lose track of it. A minute ago, in replying to a question, you referred to earlier matters in connection with these trust patents. Did you consider, as a part of your consideration of the value of the services of these particular petitioners, the services that were rendered by other counsel, entirely separate and apart from these parties, in the so-called Sainte Marie cases, which were the original decisions involving the validity of trust patents?

Mr. Preston: I don't understand that anything has been said about it, that Sainte Marie case. I have never asked him anything about it.

The Court: Do you object?

Mr. Preston: I do object, if your Honor please, on the ground it doesn't appear to be pertinent to any issue here. [61]

Mr. Brett: He has stated he considered the whole series of litigation involved in this matter, and a moment ago he said, "Do you mean the earlier case involving the trust patent?" I want to know whether he considered that as well in fixing this fee.

The Court: You may answer.

The Witness: If you and I are together on what you mean, Mr. Brett, by your word "consider,"

(Testimony of L. R. Martineau, Jr.)

naturally, I considered everything which I thought had a fair bearing on the establishment of the reasonable fee, but whether I selected it as one of the factors which should determine the amount of that fee in my judgment is quite another matter.

I was familiar with the Sainte Marie case long before Judge Preston ever called me into the Lee Arenas case, as I try to keep familiar with Supreme Court decisions on Indian and other matters. I had considered that case long before I ever knew Judge Preston had anything to do with this case.

If you mean by your question, did I use it as a factor in determining the specific amounts that I fixed in this proceeding here this morning, the answer is no.

Q. (By Mr. Brett): That answers that. Now, then, Mr. Martineau, one of the factors that you did consider in arriving at an opinion that these attorneys were entitled to at least \$30,000.00 and up to \$75,000.00 as a reasonable fee, was the legal problem that existed at the time they accepted [62] the employment from Eleuteria Brown Arenas to enforce her right to a trust patent; is that not correct? A. Yes.

Q. You knew that that proceeding was filed in January, 1947?

A. I knew the proceeding was filed on the 9th of January, 1947, as stated in the hypothetical question.

Q. You also knew, from your familiarity with the previous decision of the United States Supreme

(Testimony of L. R. Martineau, Jr.)

Court in *Arenas v. U. S.*, which is reported in 322 U. S., at page 419, that on pages 425 and 426 of that opinion the United States Supreme Court had determined that by an act of 1917 the Secretary of the Interior was mandatorily required to give and issue trust patents in severalty to every member of the Palm Springs Band of Mission Indians, provided he could show that he was a member of that band and provided that a selection was made according to law; is that not correct?

Mr. Preston: May it please the Court, I think that is an improper question. It assumes facts not in evidence. It misapplies the facts as I know them to be true, and is in no wise an element of this witness' opinion, as I understand it, but is another move by counsel in his effort to becloud the issue here. I want to tell him that the decision declaring that it was mandatory upon the Secretary of the Interior to make allotments was rendered in 1944. That is over six years [63] ago.

They not only didn't obey that opinion at that time or at any other time, but it was necessary for me, and I did go to the District of Columbia and file a mandamus proceeding against the Secretary of the Interior to make him make these allotments.

The allotments are only slovenly made now, and they are not half through, and there are two actions pending here, one in particular, to correct the inequities and contradictions and unlawful acts of the Secretary already committed with reference to the allotments that are not unfinished, and we are getting nowhere, in my opinion, in estimating the value

(Testimony of L. R. Martineau, Jr.)

of the services here, by cross-examining this witness on the opinion of the Court and what he knew about the opinion of the Court in that case. The Government hasn't obeyed the opinion at any time or place.

Mr. Brett: Your Honor, I don't want to try extraneous matters in this case, and I don't want to attempt to answer Judge Preston now, even though I could. One of the factors the witness would have to consider, and he has admitted he did consider, would be the legal problem that was involved. The legal problem involved, as shown by the pleadings, is whether or not a particular member of the Palm Springs Band of Mission Indians was entitled to a trust patent.

In the hypothetical question, the witness has been asked [64] to fix a value based upon a substantial amount of work which was done in connection with the proceedings, and to fix the value of these particular proceedings.

This question I have just directed to the witness is to show that by a final decision of the Supreme Court of the land—just a minute, please, Judge Preston—at least three years before the complaint in this action was filed, it had been determined that every member of the Band of Mission Indians, Palm Springs Band, who made an adequate selection, was entitled to such a trust patent.

I intend to show, after showing he considered that factor, that he also knew by the pleadings tendered here that there was no issue on that point.

(Testimony of L. R. Martineau, Jr.)

The only issue, sir, was whether or not she was a member of the band and whether or not there had been a selection. I think I am entitled to interrogate him on that.

I don't believe, if the Court please, that one can conscientiously maintain you have to review law and make research to support a point which the Supreme Court has squarely and finally decided. That in itself is complete. That is the purpose of my question.

Mr. Preston: His question is way afield. This witness, as I understand his testimony, only means to state that the knowledge acquired from the research and labor performed in prosecuting the Lee Arenas case was material on hand, [65] equipment for the lawyer when he got ready to start the other case, and it necessarily had some bearing on the value of his services.

Have I characterized it correctly? If not, I wish you would explain that.

If I understand this witness' testimony, he has only given what is known as a mere association connection with the Lee Arenas case as adding an element of value to the services in this case, and not a duplication of services at all. If I understand him rightly, this question is far afield.

The Court: I have been observing here, during the examination of this witness, a lot of inquiries made by counsel on both sides which to my mind have no application here. The Circuit Court of Appeals has sent this case back to this court on a man-

(Testimony of L. R. Martineau, Jr.)

date to determine in dollars and cents what was the value of the petitioners' services in this case. It may involve an inquiry in the main case, which is still pending before Judge Mathes, I understand, to determine that same question, as to what were the services rendered in the main case that went to the Supreme Court to be determined, and if I undertake to determine those elements with this, you are going to have a duplication before Judge Mathes, and you can't escape it.

You can determine that there, as to what services were rendered in the main case where the Supreme Court has held [66] under this act of Congress these allotments must be made to the Indians in that reservation.

Mr. Preston: As I understand this witness, the equipment acquired by the attorneys in prosecuting the Lee Arenas case was material to the prosecution of this case.

The Court: When you go before Judge Mathes and ask him to fix attorneys' fees, and he does it and I do it, you are going to have a duplication.

Mr. Preston: And the first thing Mr. Brett says when you get in the other court is, "You musn't have too much of a fee in this case, because you are getting a fee from the rest of them," and now in this court he says, "You can't get a fee in this court, because you are going to get it in the other."

Mr. Brett: Your Honor, I never made such a statement.

Mr. Preston: You did, and I heard you do it.

(Testimony of L. R. Martineau, Jr.)

The Court: Of course, you are entitled to recover for services in these cases, but we must try to keep them separate and distinct in fixing the amount of the services in each case.

I wanted to fix the attorneys' fees at 12½ per cent of the value, and you were to go and see what the value of the property was and you were going to come back and let the court know what was the value of it, but the Circuit Court of Appeals says, "You must determine in dollars and cents." It seems to me they have got the cart ahead of the horse. [67] That is what I am here this morning for. I am having difficulty in separating this mandate from my own conclusion reached in this case. I tried to protect both sides. I limited it to the services rendered in this particular case, with 12½ per cent of the value. It was to be paid out of the allotment. If the value, when it came back from a trustee which we appointed, was not sufficient, the court could order a hearing on that. There was a duty to do it. But practically it doesn't seem to be working out.

It is justice for these Indian people, to see that they get something more than a bonnet and a pair of gloves out of this.

Mr. Preston: While we have that subject in mind, I want to say to you, of course, it originated with me, but I don't think the Government of the United States ever intends to let the Indians sell a foot of this land. That isn't their intention. That is not why they are fighting here. It is to beat this

(Testimony of L. R. Martineau, Jr.)

down as low as they can get it, in order that the Government itself can absorb the claim. They don't intend to allow this. It would be the darkest blot on the character of the Department of Indian Affairs that was ever known, to let this Indian property sell for the misdeeds of the Commission itself.

The Court: The court is here to protect the Indians, to see that they are not sold for any little, inadequate [68] amount, just enough to pay attorneys' fees. They are entitled to something out of it over and above the expense of these litigations. That is what the court is here for. Congress has conveyed this property in trust to these Indians, and the Government can't take it away from them. It is a question of handling this property and their protection by the Government they are the wards of. That is what the court is here to do, to see justice is done to the attorneys and to them. Let's see if we can't get something that is fair to both sides.

Mr. Preston: Is the court bound by the 12½ per cent?

The Court: No. I might say I don't see how you can get it without selling the property.

Mr. Preston: We want nothing but what is reasonable in this case.

The Court: I know you do.

Mr. Preston: We have contended for nothing else. This is now going onto the eleventh year in this fight that has been on in the courts, and the

(Testimony of L. R. Martineau, Jr.)

Government has dragged its heels in the ground at every turn of the road, just as they are doing today. They have got this witness off on a wild goose chase now.

The Court: We are considering both cases. You injected that in here. You want me to consider it in fixing the attorneys' fees. I tried to fix fees on a value of the [69] allotment, and Judge Mathes tried to do it in the main case. We tried to get at it mathematically to do justice to these Indians and to protect counsel who have rendered services all these years. There is a way to get at it and we will get at it if it takes me a month.

Mr. Brett: I believe, your Honor, the real issue before the court is a ruling upon the Judge's objection to my question, that is, whether or not this man as a part of his consideration considered and knew, at the time these attorneys accepted this employment, that a final decision had been made.

The Court: He may answer that.

The Witness: If the Court please, I would like to state——

The Court: There is too much argument back and forth here.

The Witness: I am a member of the bar, also.

The Court: You must remember he has asked you a question and the court has ruled. He has asked you, Did you consider it? Answer that yes or no.

Read the question to the witness. We are arguing

(Testimony of L. R. Martineau, Jr.)

too much here, that's the trouble. We will never get anywhere.

Mr. Brett: Did you sustain the objection or allow the witness to answer?

The Court: I will allow him to answer.

Mr. Brett: I want him to answer. He can answer yes or no. He doesn't have to argue it. [70]

The Court: We have gone into it on both sides. Go ahead.

The Witness: I don't know what the question is now.

Q. (By Mr. Brett): I will ask you a very simple question. One of the issues presented by the complaint—first, I will show you the original complaint. In determining the reasonable value of the services, you took into consideration the issues which these attorneys presented by their complaint, did you not? A. In this particular action?

Q. In this particular action. A. Yes.

Q. In other words, their employment was to do something specific for a particular client, who was Eleuteria Brown Arenas? A. Correct.

Q. And in order to determine what they were to do, you read the complaint? A. Correct.

Q. The first part of the complaint was a petition that the court determine that the Indian was entitled to a trust patent as to certain lands of the Palm Springs Reservation? A. Correct.

Q. On that point, did you not assume and consider that whether it were these counsel or whether it were Joe Doaks, who was authorized to practice

(Testimony of L. R. Martineau, Jr.)

law, he could have gone to 322 [71] U.S., page 419, and have determined that in 1944, three years before he was employed, the Supreme Court had affirmatively decided, if she was a member of the tribe and if a selection was properly made, that she was entitled to a trust patent?

A. The answer is no.

The Court: Go ahead. That is an answer.

Will we finish before the recess?

Mr. Brett: No.

The Court: Then we will recess until 2:00 o'clock, now.

I will state to counsel the courtroom will be used for some other proceedings during the noon hour, and if they are not through, we will have to wait until they get through.

(Whereupon a recess was taken until 2:00 p.m. of the same day.) [72]

Monday, November 27, 1950—2:00 P.M.

The Court: Call your witness and proceed.

Mr. Brett: Mr. Martineau.

L. R. MARTINEAU, JR.

called as a witness by and on behalf of the petitioners, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Brett:

Q. Mr. Martineau, that reference was to 322 U.S., in place of 320.

Mr. Preston: But he has already answered it.

Q. (By Mr. Brett): Mr. Martineau, had you discussed with Judge Preston the memorandum which he has prepared and submitted to the court, entitled "Memorandum re Attorneys' Fees"?

A. No. I had read it, but not discussed it with him.

Q. In the memorandum, on page 5, he quoted from a decision in *Sampsell v. Monel*, 162 Federal 2d, at page 6.

Mr. Preston: That is not in the hypothetical question, is it?

Mr. Brett: Your Honor, I can't continue the examination of the witness if I can't finish a question without interruption.

The Court: Go ahead. [73]

Mr. Preston: He is cross-examining my witness about the brief I filed. That is not the hypothetical question. I filed a brief here and furnished counsel a copy of it, and now he is cross-examining this witness about that brief. That is not proper cross-

(Testimony of L. R. Martineau, Jr.)

examination. I put this witness on the stand and propounded a hypothetical question to him. That is all there is before the court.

Mr. Brett: I am sorry, your Honor, I can't conduct the examination if I can't finish a question. I ask the court's protection and I will explain this. I want to show Judge Preston has shown various elements to be considered, and I want to ask the witness if those are the elements he considered.

The Court: Go ahead.

Mr. Preston: That has nothing to do with my brief.

Q. (By Mr. Brett): There are stated the following matters as consideration in fixing attorney fees: One, the time which is fairly and properly used in dealing with the case, because this represents the amount of work necessary.

Did you give consideration to that factor?

A. I did.

Q. On that factor, Mr. Martineau, would it not be necessary for you to consider these matters: One, what the lawyer was presented with in the way of a problem at the time that the client first came to him? [74]

Mr. Preston: I object to that as not proper cross-examination.

The Court: Overruled.

Q. (By Mr. Brett): What would be your answer?

A. Would you read the question, please?

(Testimony of L. R. Martineau, Jr.)

(The question was read by the reporter.)

The Witness: I am unable to answer the question because the question is confined to that factor, to wit, "time."

Q. (By Mr. Brett): Mr. Martineau, let's put it this way. If you were going to use as one of the factors which you would consider in determining and giving your opinion as to the compensation that the attorneys were reasonably entitled to for the time given, wouldn't it necessarily require you to consider what the problem was that they were faced with when the client first came in? In other words, what you were going to do for the client?

A. Maybe I could answer it this way, by saying, obviously, the problem presented to the lawyer would consume greater or less time, but that, as I understand the allusion to the case you are reading, that factor, as you call it, is the amount of time spent by the lawyer on the particular case.

Q. Let's put it this way. Wouldn't that amount of time spent in research, in preparation of the pleadings, in getting ready for trial, depend upon the issue that his client presented that he wanted to have enforced or protected? [75]

A. It might depend upon that and on other matters.

Q. Well, then, that is one of the matters.

A. That's right.

Q. Now, then, in this case, at the time that Mrs. Arenas came in to these lawyers in connection with

(Testimony of L. R. Martineau, Jr.)

this particular case, the problem presented there was in three parts: One, her right to receive a trust patent in severalty out of the Palm Springs lands.

That was one, wasn't it? A. Yes.

Q. Two, whether or not she had complied with the law in order to get that. That would be the second? A. Yes.

Q. And, third, in her particular situation, whether or not someone authorized to act in her behalf, because she was a minor, had so acted?

A. Yes.

Q. Now, as to the first point of these three, is it not a fact that, irrespective of whether it was these three lawyers or any other lawyer qualified to practice to whom Mrs. Brown or Mrs. Arenas had come to, that the matter of her right as a member of the Palm Springs Band to receive a trust patent had been finally and completely settled by the Supreme Court in the Arenas decision in 322 U.S. at 419?

Mr. Preston: Just a minute. To which we object on the ground it is not proper cross-examination. It assumes that [76] the case of Eleuteria Brown Arenas was not considered until after the decision in the Supreme Court came down, which is not true. The case was in the hands of these attorneys from the beginning of 1940 and was in their charge all the time, pending the Lee Arenas case in the courts, and it remained with them, and all that was done after the decision was to start the suit, and that was done in 1947.

Now, it is not fair to ask him to start in in 1947.

(Testimony of L. R. Martineau, Jr.)

You have got to start in in 1940. That is when the case started.

Mr. Brett: Now, if the Court please, I always dislike to have to dispute with counsel a matter which is a matter of record, but I direct your attention to Exhibit 8, which has been received today as the first exhibit for the petitioners, if the clerk will hand it to you. I direct your attention to page 180, and 181, in which there is recited the contract with Mrs. Arenas, and I direct your particular attention to the fact that it is executed and acknowledged on December 9, 1944, which is subsequent to the date of the decision in the Arenas case.

Mr. Preston: Yes.

Mr. Brett: And, therefore, it would be an impossibility, if the Court please, for the condition which Judge Preston has previously described to exist, to wit, that their contract was in existence before the Supreme Court decision was made, because the very record they introduced, which was received [77] twice in this case, as Exhibit 2 and Exhibit 6, is dated subsequent to the date of that case.

Mr. Preston: Your Honor, we have repeatedly said in your presence here that Mr. Sallee, who is sitting here, and Mr. Clark, took the case of Eleuteria Brown in 1940. They didn't start the suit, it is true, but they had the case. She was a member of the family, and by special verbal arrangement that was the understanding, that she should follow

(Testimony of L. R. Martineau, Jr.)

the test case, whichever way it went. If it should prevail, why, her suit would follow. If they lost, there would be no use of starting her suit.

That contract of October 10, 1940, in the record, shows that he was to take care of the family. I will find it here.

Mr. Brett: I think I can direct Judge Preston's attention to page 164.

Mr. Preston: No. Page 93 is what I am reading it from here. It starts on page 89. Here it is:

"It shall be the duty of said attorney"—that is Mr. Sallee, who took the case originally—"to advise the said party of first part and to represent him before all courts, departments, tribunals, and other officers and commissions having any duty to perform in connection with said investigation, consideration, and final settlement of his said claims, and any and all matters that may be necessary in the opinion [78] of the said attorney at law, party of the second part, and in the final settlement of any and all claims and matters pertaining to said allotment to said party of the first part, or to any of the ancestors of the party of the first part, and any relative either by law or by marriage, that might become the property of party of the first part by inheritance or otherwise."

These men say that was intended to cover the case of this petitioner, allottee here, before the court. They further testify that the understanding between them at the time was with Lee Arenas that this claim should be looked after by them. That was

(Testimony of L. R. Martineau, Jr.)

in 1940. It was held in abeyance because there was no sense in taking two test cases to the Supreme Court of the United States. The expense of taking one of them was enough.

When we got the decision in 1944, the contract was materialized into a writing, but it always existed between Lee, Arenas, this girl, and them, even in 1940. It is not fair to say that a man in 1947 would know all he had to do was to follow the decision of a court in 1944.

That is further erroneous because the allotment possibly would take a new schedule, and we couldn't get it out of them except by force later. So, you see, it is just simply killing time here, beclouding the issue, and not furthering this investigation at all.

The Court: The objection is sustained. Go [79] ahead.

Mr. Brett: If your Honor please, I realize your Honor has ruled, but, for the purpose of the record only, may I make a brief statement, so that it will appear in the record?

The Court: Yes.

Mr. Brett: The contract which Judge Preston has just referred to, the one of 1940, was the one which was conditioned upon approval of the Secretary of the Interior, and the one Judge Mathes has finally held—and that was not reversed—was void.

Mr. Preston: That is not true.

Mr. Brett: The only contract that was held valid

(Testimony of L. R. Martineau, Jr.)

by Judge Mathes was the one in 1944 for quantum meruit.

Mr. Preston: If your Honor please, allow me to interrupt and say there isn't a word of truth in that. He held Clark and Sallee were bound by the contract of 1940.

The Court: Let's try to get the facts out first. You are trying to argue the case as you go along. I understand it. Go ahead.

Q. (By Mr. Brett): Tell me briefly, in your own words, your opinion of the problem that was presented to Judge Preston and his associates when they were employed by Mrs. Brown in December of 1944, what issue of law and what issue of fact they were required to prepare themselves on.

Mr. Preston: I object to that upon the ground the employment did not originate in 1944. It originated in 1940. [80]

The Court: The court is constantly up against your disagreeing on what date this contract was consummated and was in existence, before or after the Supreme Court decided what we call **the main** issue.

Mr. Brett: Your Honor may assume, from an examination of the file in the other case—Pardon me for interrupting. I shouldn't have said that. But I would like to send for the file in that case and show you where Judge Mathes expressly found that contract was void.

Mr. Preston: He said it was not binding on the Government, but it is binding on the attorneys, and

(Testimony of L. R. Martineau, Jr.)

the attorneys were held to the 10 per cent mentioned in that contract.

Mr. Brett: I will approach my question in this way——

Mr. Preston: You better approach it in the right way.

The Court: Let's get through with this case. Get down to the facts.

Q. (By Mr. Brett): Mr. Martineau, did you assume, in fixing the value which you gave this morning, that these attorneys were obligated to re-try for Mrs. Brown or Mrs. Arenas the same issue which had been tried in the Lee Arenas case de novo, as if no decision had been made on the matter of the mandatory duty of the Secretary of the Interior to issue trust patents?

A. No, I did not so assume.

Q. Did you assume, then, that when they accepted this [81] employment, that that particular matter had been finally determined by the Supreme Court, and that insofar as that issue was concerned, all that they or any other counsel would have to do would be to cite the decision of the Supreme Court?

Mr. Preston: To which we object on the ground it is not proper cross-examination, assuming facts not in evidence, and in contradiction of the facts in the record.

The Court: Sustained. I am trying my best to keep these two cases separate, the one pending before Judge Mathes and the one pending before me, but I am having a difficult time doing it. If you

(Testimony of L. R. Martineau, Jr.)

don't do that, you are going to have a duplication of attorneys' fees, that is what you are going to have. So go ahead. You understand the court's ruling, both of you.

Mr. Brett: If you are prepared to rule that you are going to exclude consideration of the work that they did on the original case, I have no further examination on that phase, but if you are not so prepared to rule and a substantial part of the fees is to be on those services, then I want to show that wasn't necessary to be considered in this case.

The Court: You do so.

Q. (By Mr. Brett): The second point you have referred to was the matter of whether or not the plaintiff in this case, Eleuteria Brown Arenas, was an adopted daughter of Lee Arenas. [82]

Mr. Preston: To which we object on the ground it is not proper cross-examination. It is in violence to the hypothetical question.

The Court: Overruled.

Mr. Preston: Whether she was adopted or not adopted has nothing to do with the case.

The Court: Overruled.

The Witness: Will you please read the question, Mr. Reporter?

(The question was read by the reporter.)

Q. (By Mr. Brett): Didn't you understand that was the second issue the attorneys were confronted with?

(Testimony of L. R. Martineau, Jr.)

A. Yes, but your question said I was compelled to consider——

Q. I will withdraw the question to save time.

I am asking you about the matters you considered as far as their efforts were concerned.

A. Yes.

Q. The second issue that the attorneys were confronted with would be the question of fact and law as to whether or not the plaintiff in this case, Mrs. Arenas, had been adopted by Lee Arenas. You understood that to be in the complaint?

A. That's right.

Q. Did you understand that anything they had done, regardless of its nature—— [83]

A. Who?

Q. The three petitioning attorneys—any work that they had done whatsoever in connection with the Lee Arenas case, either in trying it, filing briefs, or anything else, tended in any way whatsoever to assist them in establishing that point, either factually or in law?

A. I confess I am unable to answer the question because I don't understand it.

Q. I will try to spell it out a little bit. You do recall in the complaint in this case, this present case, Mrs. Brown pleaded she was entitled to a trust patent because she was the adopted daughter of Lee Arenas and had had a selection made for her. You remember that, don't you? A. Yes.

Q. That was an issue, then, that these attorneys were confronted with in the way of proof?

(Testimony of L. R. Martineau, Jr.)

A. Yes.

Q. That would necessarily involve two types of preparation. One would be facts, acts, documents, et cetera; is that not correct? A. Yes.

Q. And the other would be law? A. Yes.

Q. Now, then, the question I am asking, and I am referring, sir, again to your considerations of the services [84] that they rendered in the Lee Arenas case, all of them, is: Was there any portion of that service in any part of the files, in any part of the pleadings, in any part of the briefs, or in any part of the research which you learned they did, that would have aided them one way or the other in presenting that point in the case, that is, whether or not Mrs. Brown or Mrs. Arenas was the adopted daughter of Lee Arenas?

Mr. Preston: To which we object on the ground it is self-evident nothing in the Lee Arenas case would throw any light on the adoption.

The Court: He is asking him, did he consider it. He can say yes or no.

Mr. Preston: Then the answer would be no.

The Witness: The question involves more, your Honor, than as stated. I would like to have the first portion of it read. Well, read all of it.

The Court: You may read it.

(The question was read by the reporter.)

The Witness: I am unable to answer what they considered.

Q. (By Mr. Brett): In other words, you don't

(Testimony of L. R. Martineau, Jr.)

know, then, whether or not anything they did——

The Court: He says he is unable to answer.

Mr. Brett: I think that is correct.

Q. Now, then, as to the next matter, the third consideration was whether or not anyone with authority had made [85] a selection for this minor, that was the third point involved in this case; is that not correct?

A. That is the way you stated it, yes.

Q. You are aware of the fact that at the time the selections were made she was a minor?

A. I am.

Q. I will repeat in part the question I asked before. In any part of the work which they did in connection with the Lee Arenas case, the trial, the briefs, the research, or anything involved in that case which you have learned that they did, is it your opinion that any part of that would have assisted at all on the matter of making proof of the fact and sustaining the law as to whether or not anyone had legal authority to make a selection for this child?

A. I could answer that question, but it would be a dissertation on the fact that anything a man learns from the time he is a baby down to date has a bearing on what he considers or what he thinks.

Now, if you are asking a specific question about the use, for instance, that I made of taking a course in contracts when I was in law school, that affects my everyday work, and so in torts, and so in every-

(Testimony of L. R. Martineau, Jr.)

thing else, and so as to all of the other cases which I have had involving legal problems.

So long as I differentiate between clients so that I do not charge clients for my education and so that their [86] individual problem is handled fairly and on a reasonable basis, I am entitled to whatever I may know about whatever subject.

That doesn't answer your question yes or no. I regret that I can't answer it in the way you phrase it.

Q. Well, you do know, Mr. Martineau, that there was no issue involved in the Lee Arenas case, in any part of the various trials, that concerned a selection for an orphan or minor child, don't you?

A. I am aware of that, yes.

Q. Just so that we will have the record clear, your opinion of value of services in this case doesn't include all of the various litigation that Judge Preston has detailed that he has performed for various clients throughout his career, does it?

A. Certainly not, except as they go to his qualifications.

Q. Now, Mr. Martineau, we have first reached the stage where they had to prepare their pleadings. The next stage they would be confronted with would be when pleadings were joined and issues were joined; isn't that right?

A. Ordinarily, that would be correct.

Q. In this case, you learned that as far as the issues were concerned, the only issues that were joined were whether or not Mrs. Arenas was an adopted daughter of Lee Arenas, and [87] whether

(Testimony of L. R. Martineau, Jr.)

or not anyone had the legal right to make selections for her?

A. I did not so assume that that was the only issue that might be involved in the lawsuit.

Q. What other issue did you believe was involved in the lawsuit at the time it came up for trial?

A. Are you talking about the time it came to trial or the time of the employment, or the time of the 1944 contract?

Q. I am talking about the time when issue was joined in this present case, 6221, the complaint had been filed and an answer had been filed by the respondent.

A. That's right.

Q. I will repeat my question. Did you not learn, then, from your examination of the pleadings, that the issues left to be determined and to be established were, one, whether or not this plaintiff, Mrs. Arenas, was the adopted daughter of Lee Arenas, and, two, whether or not, if she were not so adopted, anyone did have the legal authority to select the lands in her behalf?

That all other matters were conceded by the pleadings as being in her favor?

Did you not so find, that those were the pleadings?

A. I think those issues were in the pleadings, but whether or not any concessions were made subsequently by stipulation or communication with the court or otherwise, I [88] don't know.

Q. I am not referring to that. I am referring

(Testimony of L. R. Martineau, Jr.)

to the answer. You are familiar with the elementary principle that where an answer is filed and it admits allegations in the complaint, the plaintiff no longer has to prove those issues, aren't you?

A. I would assume that I am familiar with that, yes.

Q. Did you not discover in the pleadings in this case that the answer admitted all of the allegations of the complaint except the two factors I have mentioned?

A. Yes. I admit those were the two primary factors that were left.

Q. What other factor was there left——

Mr. Preston: Object to that. Oh, go ahead. Excuse me.

Mr. Brett: Are you through?

Mr. Preston: Go ahead.

Q. (By Mr. Brett): What other factor did you consider was left as an issue to be tried?

Mr. Preston: To which we object upon the ground that the documents are the best evidence.

The Court: Overruled.

The Witness: I am unable to answer that question, Mr. Brett, for the reason I realize from long experience at the outset of a case the joinder of issues on a complaint or declaration, on the one hand, and an answer, on the other, [89] may not preclude other matters that develop during the course of the trial. What did develop during the course of this trial may have affected the amount of work these men did.

(Testimony of L. R. Martineau, Jr.)

Q. (By Mr. Brett): You have read, as you stated this morning, the reporter's transcript of the proceedings? A. That is true.

Q. Did you ascertain therefrom that any issues developed other than the issue of the adoption by Lee Arenas of the plaintiff, Mrs. Arenas, and the issue as to whether or not, if she were not adopted, the Special Allotting Agent Wadsworth, who had made the selections for her, had authority to make such selections? A. Not that I recall.

Q. I believe you have stated that, as to that particular issue, you concede that the work done in connection with the Lee Arenas case would have had no bearing one way or the other?

A. I do not so concede, because I believe, in taking that case, if it had been taken by three other lawyers, other than the three petitioners here, they would have had to consider the state of the law on the subject, so it does in that respect have some effect. Your question, if it is broad enough to mean that, Mr. Brett, I can't concede anything of that sort.

Q. Let's take the next step. We have had the trial. [90] There was a judgment rendered in favor of this particular plaintiff, that she have the trust patents as prayed. There was an appeal taken by the United States, and within one week thereafter the appeal was dismissed.

You are familiar with federal practice, aren't you, Mr. Martineau?

(Testimony of L. R. Martineau, Jr.)

A. I have been in the federal courts often enough, and I think I am.

Q. In your opinion, would there be any amount of work that would be required of competent counsel during the one-week period after the filing of a notice of appeal, before any designation of record was made, before any designation of points on appeal was made, before any action whatever was taken except the filing of the general notice of appeal, during the first week thereafter?

A. There might have been a week's work, but other than that there couldn't be, Mr. Brett.

Q. Would it be possible in your opinion for the attorney in connection with his employment, who was going to resist that appeal, to do very much affirmatively in that regard until he first knew what the basis of the appeal was, what part of the record was going to be taken up, and what points were going to be made?

A. He certainly could, if he is a thoroughgoing lawyer. Any time there is a threat of an appeal, any competent lawyer, [91] in my opinion, undertakes to get his record in shape.

Q. How long a time do you believe would have been reasonably required during that week, of competent counsel?

A. I said not in excess of a week's time.

Q. In other words, you believe that they——

A. Under your assumption of facts, Mr. Brett, of a week having elapsed, I would just assume the

(Testimony of L. R. Martineau, Jr.)

most he could put in would have been a week's work.

Q. But do you believe any competent counsel would have had to put in a week's work?

A. I know very well I would have, if it had been my case. But whether I am competent is another question. I believe I am.

Q. One of the elements which is required in this opinion is the skill employed in meeting the situation. That was one of the matters you considered, wasn't it?

A. Yes.

Q. At the time that we proceeded to trial, the two issues were the matter of adoption by Lee Arenas and the matter of whether Wadsworth had any authority to make a selection. Did you determine that there had been any depositions taken or any request made—first, any depositions taken of any representative of the Government, to establish whether there was any record to support the claim that Wadsworth had such authority? [92]

A. I have not seen any such deposition.

Q. You have assumed that no such deposition was taken?

A. I have assumed the facts set forth in the original hypothetical question. I do not believe it is there mentioned.

Q. Did you assume that any request for admissions of any kind or character was made to the respondents in the case with respect to the authority of Wadsworth to make the selection in behalf of this minor?

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: To which we object upon the ground that the question states the facts that were to be assumed.

Mr. Brett: I don't think so. The question is general. It says they consumed a certain number of days.

The Court: Overruled.

The Witness: Not unless those facts appear in the hypothetical question propounded by Judge Preston.

Q. (By Mr. Brett): You did learn, did you not, that during the course of the trial no such evidence was submitted to the court? By "such evidence" I mean there was no writing submitted to the court showing that Wadsworth had any such authority.

A. Yes.

Q. And you did learn, also, that the first time that such information was submitted was subsequent to the trial and the submission of the cause to Judge Cavanah? [93]

A. Yes.

Q. In your opinion, would you say that a circumstance of that character showed exceptional or average skill in the preparation of such issue?

Mr. Preston: If you had those letters, you would have put them out, I should think. Maybe you are sitting on them. We found the letter that disclosed the authority after the case was submitted, and the letter came from the possession of the Government.

Mr. Brett: Your Honor, I don't choose to answer comments. I am asking the witness a question.

(Testimony of L. R. Martineau, Jr.)

I think it is a proper question and I would like to have it answered.

The Court: Go ahead. Answer the question.

Read the question.

(Question read by the reporter.)

The Witness: I don't understand that question.

Q. (By Mr. Brett): Let me ask you another and we will get through.

You are familiar, you say, with federal practice, and that would include equity practice?

A. Very familiar for a great many years.

Q. And this you knew to be an equity case?

A. Yes.

Q. Isn't it just elementary in the preparation of an equity case, if the material which you want is in the hands [94] of your adversary, or you believe it is, to either take the deposition of your adversary or to make request for admissions from your adversary?

A. That in my opinion is not elementary, but a matter of judgment of counsel who has the case in hand.

Q. With reference to the value of these services, the hypothetical question has assumed a valuation of \$300,000.00. I will ask you, Mr. Martineau, if this honorable court should rule in line with the opinion of the Court of Appeals that the value of the property is to be the value of the Indian's interest, which is a trust patent, and assuming that the testimony should show that the valuation of

(Testimony of L. R. Martineau, Jr.)

such interest would be \$41,000.00, what would be your opinion? Assuming all the other factors of Judge Preston's hypothetical question, what would be the reasonable value of the services performed by these petitioners?

A. Disregarding the fact that you say the hypothetical question propounded to me by Judge Preston mentioned only \$300,000.00, because it mentioned \$300,000.00, \$200,000.00, and \$100,000.00, you are now asking me to assume that it has been adjudicated, or may hereafter be adjudicated, that the total value of the interest of Eleuteria Arenas is of the market value of \$41,000.00?

Q. That is correct, yes.

A. And asking me what in my judgment a reasonable fee [95] would be under such circumstances?

Q. Yes, sir.

A. I think a reasonable fee under such circumstances would be \$20,000.00.

Q. Assuming that the court should find that the reasonable value of the Indian's interest, trust patent interest, was \$30,000.00, what would be your opinion as to the reasonable value of the services of these attorneys?

A. I believe that as you decrease the amount of the value of the interest, where the services are rendered entirely on a contingent basis and the attorneys have to carry the load, that the smaller the amount involved, the larger in proportion is the attorneys' fee. In this instance, and under your assumption of a \$30,000.00 valuation instead of

(Testimony of L. R. Martineau, Jr.)

\$41,000.00, which you took in your preceding question, I would say that any figure between \$20,000.00 and \$25,000.00 might cover the amount of work done upon a reasonable basis.

Q. Have you assumed that the services rendered in this case were on a contingent basis?

A. I understood so, yes.

Q. Did you not read in the record that this plaintiff had signed a written contract to pay on a quantum meruit basis?

Mr. Preston: Your Honor, that is a contingent contract, if you will read it. [96]

Mr. Brett: I think the question should be answered, your Honor.

The Court: Read the question.

The Witness: Re-read the question, will you, please?

(Question read by the reporter.)

The Witness: I read the various contracts which appear in the record, Mr. Brett. I don't know at the moment to which one you refer.

Q. (By Mr. Brett): Well, Mr. Martineau, I am going to show you a copy of the printed transcript on appeal in Case No. 12218. I believe you have a copy. A. I do. What is the page?

Q. The document is the same document which has been received in evidence in this case as Petitioners' Exhibit 8. I refer you to page 180 and page 181.

Do you find on those pages a transcription of the

(Testimony of L. R. Martineau, Jr.)

contract dated December 9, 1944, signed by Della Brown, also known as Eleuteria Brown Arenas?

A. I do.

Q. I will ask you to read that, if you will, and state for the record any portion of that in which it is stated that the compensation of these counsel is to be contingent.

A. I think the word "contingent" does not appear in that contract.

Q. As an experienced lawyer, would you say that that [97] contract could be construed as a contingent contract?

Mr. Preston: Objected to as a question of law for the court to determine.

The Court: Sustained.

Q. (By Mr. Brett): Now, Mr. Martineau, one other question, and I believe I am going to be finished. I ask you to examine page 93—I believe it begins on page 89 of the same document, which is a contract between David D. Sallee and Lee Arenas, and which, although I dispute it, Judge Preston has stated was a contract on behalf of this plaintiff, Eleuteria Brown Arenas. I will ask you to examine that contract, which appears on page 89 and ends on page 96, and ask you whether or not that contract is on a contingent basis?

Mr. Preston: To which we make the same objection, your Honor. It is argumentative. The contract is before the court.

The Court: Sustained.

Q. (By Mr. Brett): Did you, in giving the

(Testimony of L. R. Martineau, Jr.)

opinion which you expressed earlier of various values, ranging from \$75,000.00 down to \$30,000.00, assume that there were any contracts in existence between the plaintiff and these petitioning attorneys, Preston, Clark, and Sallee, which are not transcribed in the transcript of the record?

A. No.

Q. In case 12218? [98]

Mr. Preston: What was the answer? Was it "No"?

Will you read that answer?

(The answer was read by the reporter.)

Mr. Brett: That concludes my cross-examination.

Mr. Preston: One or two question, your Honor, on redirect.

Redirect Examination

By Mr. Preston:

Q. Did you answer the question as to what your figures would be if reference to the Lee Arenas case was stricken from the hypothetical question?

A. Do you mean the part which you and Mr. Brett excluded?

Q. Yes.

A. Which appears on my copy of the hypothetical question at page 4, commencing line 31, with the word "Thereafter," and continues to the end of the paragraph, which is on page 5, line 4.

(Testimony of L. R. Martineau, Jr.)

Q. Would your answer be any different if that were deleted? A. No.

Q. The minutes of the court show that this cause was called in another department for trial and was transferred out to this department, which consumed part of two days. Would that situation make any difference in your figures? [99] A. No.

Q. What phase or phases of the Lee Arenas case did you consider in estimating the fees that should be allowed the petitioners in the present case? What was the relation?

A. None whatsoever, except as they had a bearing on what lawyers who are familiar with the subject call Indian law.

Q. If some third person had been called in to the present case, the Eleuteria Brown Arenas case, if a new lawyer, who had not familiarized himself with the Lee Arenas case, had been called in, he would have had to use his own research, would he not, to prepare for this case?

A. Yes, he should.

Q. Is that what you mean by the relationship between the cases?

A. That is what I meant by the consideration of law as distinguished from the factors that the courts have said should enter into a reasonable fee.

Q. Is that all the explanation you care to make of the reason you make the statement you do?

A. Yes, Judge Preston, for the reason that if, instead of employing Mr. Sallee, Mr. Clark, and you, this plaintiff, original plaintiff, had sought the

(Testimony of L. R. Martineau, Jr.)

aid of A, B, and C as attorneys, a very substantial amount of work would have had to be done by A, B, and C to get abreast of what you had learned in the other case, but none of the work for which you [100] were paid in the Lee Arenas case should be again paid for in this case.

Q. In other words, the know-how is of some value? A. Yes.

Mr. Preston: That's all.

Mr. Brett: May I ask two questions, and I promise that will be all?

The Court: Be sure it is just two.

Recross-Examination

By Mr. Brett:

Q. Now, Mr. Martineau, is it not a fact that upon the issue of whether or not a member of the Palm Springs Band of Mission Indians was entitled to a trust patent in severalty, a lawyer could get his complete answer by referring to Title 25, Section 345, of the United States Code, and the decision of the Supreme Court of the United States in *Arenas v U. S.*, in 322 U.S., wherever that opinion appears in 322 U.S.?

Mr. Preston: To which we object that it is argumentative, a question of law, and not a matter for cross-examination.

The Court: Sustained.

Mr. Brett: No further questions.

Mr. Preston: Thank you very much. That's all. This witness would like to be excused.

The Court: You are excused.

(Witness excused.) [101]

Mr. Preston: I would like to have the record show that the original Eleuteria Brown action for the adjudication of her right to an allotment came up for hearing on the 16th day of March, 1948, and came on for trial and was ordered continued to the 23rd day of March, 1948, at 10:00 o'clock, and then transferred to Judge Cavanah for trial. That is 3-23-48. It came up first 3-16. When it got over here it was 3-23. So there was a part of two days, and I suppose that is the way the two-day feature got in the case.

Mr. Brett: There is no objection.

The Court: If there is no objection, it may be admitted.

Mr. Preston: Your Honor, we have one valuation witness that was tied up as a witness in another court and can't be here this afternoon, I regret to say. Your Honor will recall the record now is that the testimony of Benton Beckley is in the transcript now before you in which he fixed the value of this property at \$300,000.00.

There is the testimony of two government witnesses that fixed very much smaller amounts. I understand counsel wants to further cross-examine Mr. Beckley, and I would be appreciative if he would engage the rest of the afternoon session in that feature, if he would like to do so at this time.

Is that all right?

(Testimony of C. H. Perdew.)

Mr. Brett: I want to interrogate another witness briefly first, if I may. [102]

Mr. Preston: That's all right. Is it germane to this issue? Maybe we can stipulate.

Mr. Brett: May I consult with Judge Preston just a moment, your Honor?

The Court: Yes, you may do so.

(Short interruption.)

Mr. Brett: I am willing to proceed out of order until Judge Preston has his next witness.

The Court: Have you any other witness besides the one you are waiting for?

Mr. Preston: That is the only one I can think of at the present time.

The Court: You may proceed then out of order. Go ahead.

Mr. Brett: Mr. Perdew.

C. H. PERDEW

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: C. H. Perdew.

Direct Examination

By Mr. Brett:

Q. What is your official position, Mr. Perdew?

A. District Agent.

Q. Of what? [103]

(Testimony of C. H. Perdew.)

A. Of the Sacramento Area District.

Mr. Preston: You will have to talk louder, or else I won't get you.

The Witness: District Agent of the Sacramento Area Agency Office, California Indian Agency.

Q. (By Mr. Brett): Does that include the Indian Reservation known as the Palm Springs Reservation? A. Yes, it does.

Q. And in connection with your official duties, do you reside upon that reservation?

A. Yes, sir.

Q. For how long have you resided there?

A. Nearly six years.

Q. In connection with that residence and in connection with your duties, have you become familiar with the streets and the locations thereof that exist in the Palm Springs area adjacent to the Palm Springs Reservation? A. Pretty well, yes.

Q. Are you personally familiar with the locations of the three properties on which trust patents have been issued pursuant to the judgment of this court in this proceeding to the plaintiff Eleuteria Brown Arenas? A. Yes, sir.

Mr. Brett: Would you mark this as the government's exhibit or respondent's exhibit, whichever it is? [104]

The Clerk: Respondent's Exhibit A for identification.

(The document referred to was marked Respondent's Exhibit A for identification.)

(Testimony of C. H. Perdew.)

Mr. Brett: And will you please mark this as Respondent's Exhibit B for identification, this drawing.

(The drawing referred to was marked Respondent's Exhibit B for identification.)

Mr. Brett: May the record show, Judge Preston, that counsel for the respondent has exhibited Exhibits A and B for identification to you?

Mr. Preston: Yes. I would like to have copies of them, though. Do you want to offer them in evidence now?

Mr. Brett: No.

Q. Mr. Perdew, you have seen this drawing, which has been marked as Respondent's Exhibit A for identification, have you? A. Yes, sir.

Q. And upon that drawing is the two-acre parcel which has been allotted to Mrs. Arenas shown?

A. Yes.

Q. And how is it designated?

A. Lot 50, Lot No. 50.

Q. Is there a color designation?

A. Pink or red, whatever it is.

Q. With reference to the properties surrounding that [105] two-acre parcel on all sides, does the drawing show other allotted properties?

A. Yes.

Q. First, with reference to the area which borders the two-acre allotment on the north, what does the drawing disclose? A. Lot 47.

Q. And is that allotted under a trust patent in

(Testimony of C. H. Perdew.)

severalty to some other member of the Palm Springs Band? A. Yes.

Q. And what other member?

A. It is one of the Andreas children. I don't see the name on there.

Q. Virginia Anne Milanovich, isn't that the allotment? A. Yes, Virginia Anne.

Mr. Preston: The Lee Arenas adjoin that, don't they?

Mr. Brett: That isn't on here.

Mr. Preston: It should be on here, 46 and 47. Where are they?

Mr. Brett: Just a minute, Judge, please.

Q. Your answer is on the north the allotment of a two-acre parcel is shown in blue by the number 47, lot 47, and that is allotted to Virginia Anne Milanovich, a minor? A. Yes.

Q. And she is receiving an allotment trust patent of [106] that area? A. Yes, sir.

Q. Let's take the east of the property. Has the property which borders the two-acre parcel allotted to Mrs. Arenas on the east been allotted in severalty? A. Yes.

Q. To whom has it been allotted?

A. That is No. 42. That was allotted to one of the Andreas children.

Q. One of the Andreas, A-n-d-r-e-a-s?

A. Yes, sir.

Q. Let's go to the south of this property. What lot appears to the south of it? A. Lot 51.

Q. Has that property been allotted under a trust

(Testimony of C. H. Perdew.)

patent in severalty to another member of the Band?

A. Yes, it has.

Q. To whom has it been allotted?

A. One of the other Andreas children, John Andreas, I believe it is.

Q. The property to the east of the two-acre parcel, has it been allotted to another member of the Band?

A. Yes, sir.

Q. By a trust patent in severalty?

A. Yes. [107]

Q. How is it designated on the drawing?

A. Lot No. 49.

Q. And in blue? A. In blue.

Q. To whom has it been allotted?

A. Corinne Welmas.

Q. What is the principal business thoroughfare in the city of Palm Springs?

A. Palm Canyon Drive.

Q. Is that shown on the drawing?

A. Yes, sir.

Q. And in what form is it shown on the drawing?

A. That is in blue.

Q. Is there a business street which borders the section 14 in the Palm Springs Reservation?

A. Palm Canyon Drive.

Q. I say which borders Section 14 in the Palm Springs Reservation. Is there any business street which borders it?

A. Only Palm Canyon Drive.

Mr. Preston: Indian Avenue.

The Witness: Indian Avenue. Pardon me.

(Testimony of C. H. Perdew.)

Q. (By Mr. Brett): On which side does Indian Avenue border Section 14?

A. On the west side.

Q. Is it shown on Respondent's Exhibit A [108] for identification?

A. Yes, sir, in green.

Q. There are some other roads shown by name, with just two parallel lines. Are you familiar with the fact that such roads exist, as shown on the drawing?

A. Yes, sir.

Q. Will you enumerate for the record, beginning at the top, the various roads that are so shown and state the direction in which they run?

A. They run east and west. Alejo Road.

Q. Is that A-l-e-j-o?

A. That is the first one.

Q. To the north?

A. The section line, north. The next road south of that is Amado Road. It runs east and west.

The next one shown is Andreas Road, running east and west.

Q. Let me stop you there. Those three roads run here along the boundary line in the north or into the Indian reservation?

A. Yes, sir.

Q. East of Indian Avenue?

A. Yes.

Mr. Preston: Are they a part of 14 or not?

Q. (By Mr. Brett): Those three roads either border on [109] or are in Section 14, is that correct?

A. Yes.

Q. Now, proceed. What is the next road?

A. Arenas Road.

(Testimony of C. H. Perdeu.)

Q. Now, take each road from the top to the bottom of the drawing.

A. Starting at the top, Tahquitz Drive.

Q. Tahquitz Drive runs in what direction?

A. East and west.

Q. Does it go into the reservation?

A. No, sir. It stops at the reservation line.

Q. In other words, it runs west from Indian Avenue and crosses Palm Canyon Drive and then proceeds west into the main town of Palm Springs?

A. That is right.

Q. But does not enter into Section 14 of the reservation? A. No, sir.

Q. What is next?

A. The next street is called the Plaza. That is a short street between Palm Canyon Drive and Indian Avenue, running——

Q. In what direction?

A. East and west between the two streets there.

Q. Does it enter into Section 14 of the [110] reservation? A. No, sir.

Q. The next street?

A. The next street is Andreas Road—Arenas Road, rather, Arenas. That runs through the reservation and then it runs west of Indian Avenue, continues across the city.

Q. It continues west of Indian Avenue and across Palm Canyon Drive? A. Yes.

Q. And runs in an east and west direction?

A. Runs in an east and west direction.

Q. What is the next street?

(Testimony of C. H. Perdew.)

A. The next is Baristo Road, B-a-r-i-s-t-o. That runs into the reservation and it runs west from Indian Avenue across the private-owned land of the city.

Q. You say Baristo Road runs into the reservation?

A. It is not really a road, it is shown on the map, but was never improved. There is a road there or should be, anyway.

Q. And the next road?

A. The next road is Ramon Road, which borders the south line of Section 14, and it runs east and west across Indian Avenue and Palm Canyon to the west, and east along the south line of Section 14.

Q. And then there are shown several roads, in addition to Palm Canyon Drive and Indian Avenue, which run north and [111] south. First, with reference to the east boundary of section 14, what road exists?

A. On the east boundary?

Q. Yes. A. That is Sunrise Way.

Q. And that runs the entire length of Section 14?

A. Yes.

Q. Connecting Alejo Road with Ramon Road?

A. Yes, sir.

Q. Is there any other road through the reservation between Indian Avenue and Sunrise Way running north from Ramon Road to Alejo Road?

A. Yes, sir.

Q. What road is that?

A. Calle Encilia and El Segundo Road.

(Testimony of C. H. Perdew.)

Q. Are there shown here some roads running south of Ramon Road? A. Yes, sir.

Q. And what roads are they?

A. The first one shown is Calle Ajo and Calle Encilia.

Q. Calle Ajo and Calle Encilia?

A. Yes. Santa Rosa, Calle Abroni Aurita.

Q. What is the distance, Mr. Perdew, from the east boundary of Indian Avenue to the most westerly boundary of the two-acre parcel allotted to Mrs. Arenas, and which is shown [112] on the drawing as Lot 50? A. I believe it is 528 feet.

Mr. Brett: I will offer the drawing, if the court please, as Respondent's Exhibit A.

Mr. Preston: May it please the court, I have no particular objection to this as a marker for relative positions, but the Palm Springs Indian lands were officially surveyed, certainly, covering the area involved here. An official plat was made, streets are laid out on it that are not shown in this paper at all, as I understand it, and every lot abuts a method of ingress and egress, a road, and those are left out of this. If I am mistaken, I will apologize, but I don't see them here. In my opinion, this thing would do nothing but mislead the court. What I want to do, if it is admitted, is to be able to furnish the court with an official map showing the true situation.

The Court: You may do so. This may be admitted for what it is worth.

Mr. Preston: For what it is worth. All right.

(Testimony of C. H. Perdew.)

The Clerk: Respondent's Exhibit A in evidence.

(The exhibit referred to was received in evidence and marked Respondent's Exhibit A.)

The Court: I have no official map before me at this time. It has been admitted for what it is worth. What's next?

Q. (By Mr. Brett): Mr. Perdew, I will show you a [113] document which has been marked Respondent's Exhibit B. You have seen this before?

A. Yes, sir.

Q. Does this drawing show the public way known as Palm Canyon Drive?

A. Yes, it does.

Q. And does it also show the two additional allotments in severalty on which trust patents have been issued to Mrs. Arenas, to wit, the five-acre and the 40-acre plots? A. Yes.

Q. How are they shown on the drawing?

A. They are shown in—did you say Mrs. Arenas?

Q. Eleuteria Brown Arenas.

A. They are shown in pink.

Q. With the letter E? A. The letter E.

Q. Is Palm Canyon Drive the principal thoroughfare in the city of Palm Springs?

A. Yes, sir.

Q. Does this drawing show an extension of it southerly adjacent to the five-acre parcel?

A. Yes, sir.

(Testimony of C. H. Perdew.)

Q. I will ask you if the five-acre parcel, with the exception of its frontage on Palm Canyon Drive to the west, is entirely surrounded by lands which are allotted in severalty [114] under trust patent to other members of the Palm Springs tribe?

A. Yes, sir.

Q. Will you state to the court whether the drawing shows the lands which are immediately north of the five-acre tract?

A. That is the five-acre allotment which is the allotment of the heirs of Guadalupe Arenas.

Q. How is it designated?

A. Designated by the letter D.

Q. And in blue? A. In blue.

Q. To the east of the five-acre tract, does the drawing disclose the trust patent which borders it?

A. It shows the 20 acres of Lee Arenas in blue with the letter C.

Q. And to the south?

A. South is the 10-acre selection of Peter Siva.

Q. How is it designated?

A. It is No. 34, in blue.

Q. Does the drawing show another highway in that area?

A. It shows the state highway along the north of the section.

Q. What direction does that highway go?

A. It runs east and west.

Q. Are there allotments, trust patents in severalty, to [115] the other members of the Palm

(Testimony of C. H. Perdew.)

Springs Band which completely border the 40-acre tract?

A. Yes, sir.

Q. With reference to the north of that tract, what does the drawing disclose?

A. That is two 20-acre pieces of Laverne Virginia Milanovich and her daughter, Virginia Anne Milanovich, a minor.

Q. How is Laverne's shown? A. In blue.

Q. By what number? A. No. 9.

Q. How is Virginia Anne's shown?

A. No. 10.

Q. To the east of the 40-acre tract, what does the drawing disclose?

A. An allotment of Pricilla Anne Pete, shown as No. 60 in blue, 20 acres, and an allotment of Larry N. Hatchet, shown in blue as No. 7.

Q. To the south?

A. To the south is the allotment of Leonard Joseph Sauvel designated as No. 24, also in blue.

Q. And to the west of the 40-acre allotment?

A. That is portrayed by the 40-acre allotment of the heirs of Guadaloupe Arenas designated as D in blue. [116]

Mr. Brett: I will offer this as Respondent's Exhibit B.

Mr. Preston: To which we object on the ground it is not official and perhaps not correct, but there will be no objection to its being used as a method of illustration.

Mr. Brett: Both of these are offered only for illustrative purposes, your Honor.

(Testimony of C. H. Perdew.)

The Court: It may be received.

(The exhibit referred to was received in evidence and marked Respondent's Exhibit B.)

Mr. Brett: That's all, Mr. Perdew.

Cross-Examination

By Mr. Preston:

Q. Isn't there an official map of the allotments made in 1927 in your files?

A. In the office, yes, sir, but not with me.

Q. And doesn't each allotment, according to that survey, front upon an outlet of some kind to the street?

A. I don't think it does in the 5's and 40's.

Q. How is that?

A. The five and 40-acre selections don't.

Q. I am talking about Section 14. That does, doesn't it?

A. Yes. Not in all cases, but in most cases.

Q. Exhibit A here does not show the outlet for the Eleuteria Brown two acres, does it? [117]

A. No, sir.

Q. And yet there is an alley about 60 feet wide, is there not, right in front of it?

A. Yes, sir.

Mr. Brett: We concede, Judge Preston, that there are paths in there that can be used, and we make no issue on that point.

Mr. Preston: Your Honor, we filed a brief here——

The Court: Go ahead. I understand.

Mr. Preston: ——which shows by necessity we had a way out of a place like this, and we have it actually.

The Court: Go ahead. You can question him on it.

Mr. Preston: I am through.

The Court: Is that all?

Mr. Brett: That's all, Mr. Perdew.

The Court: You may step down.

(Witness excused.)

Mr. Brett: Now I will call Mr. Beckley, if I may, for cross-examination.

Mr. Preston: Be sure to stick to what was in already. [118]

BENTON BECKLEY

called as a witness by and on behalf of the Petitioners, being first duly sworn, resumed the stand and was examined and testified further as follows:

The Clerk: State your name, please.

The Witness: Benton Beckley.

Mr. Brett: This witness was on the stand in the other proceedings.

Cross-Examination

By Mr. Brett:

Q. Mr. Beckley, you have heretofore testified in proceedings before this court and in this case as a valuation witness in behalf of Messrs. Preston, Clark, and Sallee, on October 29, 1948?

(Testimony of Benton Beckley.)

A. That is correct.

Q. You were asked to state your opinion and did state your opinion at that time as to the reasonable market value of the three parcels which had been allotted to Eleuteria Brown Arenas?

A. That is correct.

Q. That testimony was given in October of 1948. If you were to give your testimony as to the value today, would it be any different, in your opinion, as to the fee value of those three parcels?

A. It is pretty hard to give a definite answer to that, [3*] Mr. Brett, due to the time that has passed in the past two years, and I have not had the time or taken the time to make an appraisal in the last two years. It would have to be a guess, which would be pretty hard to state here.

Q. You recall, Mr. Beckley, that I took your deposition on behalf of the respondent in Palm Springs on November 9, 1950?

A. That is correct.

Q. I will be specific in the record, if it is necessary, but do you not recall in such deposition you testified that it was your belief that the values had dropped from 10 to 20 per cent?

A. A leveling off of 10 to 20 per cent, I believe.

Q. In fixing the value which you previously testified to, you were fixing the value of the property as if it were owned free of any restrictions upon the right either to sell or to encumber the property, were you not? What we call, in other words, a fee simple title?

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Benton Beckley.)

A. A fee or a trust patent, either one. A fee title would be a right to sell, and in some cases would be a detriment to the property due to taxation on the property.

Mr. Preston: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Brett): Do you mean by the answer that you at that time intended to evaluate the property as a trust [4] patented property and with a restriction which would prevent the patentee, the Indian, from selling the property, and with a restriction which would prevent the trust patentee, the Indian, from encumbering the property, and would restrict the trust patentee, the Indian, from leasing the property, other than for grazing or farming, for a period in excess of five years?

Mr. Preston: Your Honor, may I interrupt with an objection at this time? I announced at the opening of this case that the question would arise as to what we were evaluating in this proceeding. Now, that carries with it, what is the nature and extent of the Indian's right? It is our contention, your Honor, that the fee simple title exists in the Indian, and with the exception of the right to alienate it and maybe a few other incidental restrictions, but the restrictions, your Honor, are in the breast of the Government of the United States.

If the Government of the United States acts honestly and in good faith with the Indian, the title

(Testimony of Benton Beckley.)

of the Indian in the hands of the United States is just as good as a title in fee, and the fact that they can control the disposition of it, the alienation of it, does not detract from its value, in my opinion. In other words, if an Indian has an allotment of land and a chance arises to sell it, if it is to the best interest of the Indian that it be sold, it is the bounden [5] duty of the Government to yield and agree, and the Government has no estate in the land. The most it has is this supervisory guardianship right and, therefore, if consent to a sale is refused, the presumption is that the land is just as valuable retained as it would be to take the money for it after being sold and restrict the money.

So we come right directly to the facts in this case, your Honor, that the Indian's title cannot be measured in marketable title. Mr. Beckley cannot evaluate the right that way, because there is no market value to a piece of property that you can't sell. Mr. Beckley means the price that a piece of property will command in the market under market conditions, with a seller and a ready and willing buyer.

So when you get a witness on the stand and say, "What is the market value when you can't sell it?" that is an impossibility. It is an impasse right there.

So what you are to value in this case is the value of the property to the Indian, the Indian's value in the property.

I earnestly assert that there is no difference be-

(Testimony of Benton Beckley.)

tween the value of the property in the Indian's hands under a trust patent and a fee simple patent—a fee simple title—because if the trust patent guardian exercises the right that it should exercise, acts in good faith and not in a breach of its trust, the Indian's title is just as good as anybody else's and just as valuable. [6]

Now, in 181 Federal, page 62, you will find a footnote with all the quotations and extracts from all the decisions that were handed down to that date, on the nature of the Indian's title, and it is to all intents and purposes a fee simple title.

I have added to that another authority that I would like to pass up to the court. This is 224 U.S. 665. That case is, in my opinion, very enlightening in this proceeding. That is *Choate v. Trapp*. In that case some of the Creek Indians in Oklahoma surrendered their tribal rights to the Government and received allotments, and a covenant was made with the Indians that there should be no taxation by the State for a given period of years on those allotments. The state of Oklahoma undertook to violate that covenant, and the case went to the Supreme Court of the United States, and a very learned opinion was written there in which it was stated that the Fifth Amendment protects the Indian's vested right the same as anybody else's, and the Indian's right was a vested right, and the fact that he couldn't alienate it didn't detract from its being a protected right.

They further said that the Indian's condition

(Testimony of Benton Beckley.)

was likened to a non compos mentis person who owned a piece of property, or the estate of a minor that owned a piece of property. He couldn't sell. The management of it is in the hands of another. They illustrated the relation between the Indian [7] and the Government by reference to that relationship, and said that didn't detract from the fee simple title of the property. That is the condition here.

When he goes talking about the restrictions on it, that he couldn't sell it, or how much he would knock off if he couldn't sell the property, why, it wouldn't have any market value.

The Court: Didn't that come up on the final presentation to me?

Mr. Preston: It comes up right here. Mr. Brett will be here for hours bullyragging this witness about things of that character, if we don't have an understanding right now, or as soon as possible, as to what is the Indian's right in these lands. They put on these maps to show there is no road here, no street here now, no ingress here. That is not the test at all. The test is, what are the potentialities of the situation?

This witness cannot testify what his figures would be with these conditions. He asks him, how much it would be if he couldn't sell it, how much it would be if he couldn't mortgage it, how much it would be if he couldn't make a contract or make a lease beyond five years if the lease is for grazing land, and all that talk.

(Testimony of Benton Beckley.)

That can't enlighten the court, can't do anything but detract from the even tenor of this case, which is a very [8] simple one, to find out how much we ought to be paid, if anything, for our services.

I am making this address to the court now to inform him of our position, in order that we might in some way restrict this wild-goose examination that I know will take place, because they have got his deposition here in which they kept him on the stand for hours and hours and hours along the same line. Now he has got the deposition in front of him and wants to go over that again.

I say that is clearly out of bounds. It isn't anything germane to this case at all. The only question is, if the Government does its duty, how much is the land worth in the hands of the Indian? I say it is the full title value.

Mr. Brett: First, I will answer your Honor's inquiry. I think that is a matter you are going to have to settle. I know I seem to be the butt of many words, but I have to present the case as I believe my client requires it.

The Court: Go ahead.

Mr. Brett: I will explain the basis of this question. The mandate in this case arises out of three decisions in the Court of Appeals. The actual decision in this particular case was merely a portion of three decisions. The main decision in the mandate was in the Lee Arenas case. This case was tied in with it. In the decision and the mandate, they

(Testimony of Benton Beckley.)

cover the same ground. The court, as your Honor commented [9] this morning, referred to the fact that both your Honor and Judge Mathes had chosen to fix the fees on the basis of a percentage of the property. That fee was fixed as a percentage of the total property. One of the issues that was raised was the question of whether the Government still had an interest, any form of interest.

In determining those issues, the Court of Appeals held that the Government did still have an interest, and they used this language:

“The District Court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien, and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian’s interest in the allotted land under the trust patent.”

It is my belief, and irrespective of my belief it is my instruction to the extent that the court will permit, that that requires proof and a determination by this court, not only of the fees in money but also of the value of the Indian’s interest in money and the Indian’s interest as defined by the Indian’s interest in the trust patent.

We are not maintaining that such rights as the Indian has do not constitute a vested right. We are not here [10] attempting in any way to disparage anything that the Indian has, beyond the extent of the description of it as has been fixed by statute.

(Testimony of Benton Beckley.)

The Statutes of the United States, Title 25, Section 345, expressly prescribe that it is to be a trust patent, and that the Indian may not, nor may anybody else for that matter, encumber it, nor may he sell it, except with the consent and approval of the Secretary of the Interior.

Title 25, Section 392, U. S. Code, expressly provides any sale or lease of the property can only be made with the consent and approval and at the discretion of the Secretary of the Interior of the United States.

Title 25, Section 403, of the United States Code, is an express mandatory statute of the Congress that the property may not be leased in any event, event by the Secretary, for purposes other than grazing or farming, for a period of more than five years.

All my questions are directed to there, to find out whether, in evaluating the Indian's interest, this witness considered those factors, and whether he either has or can or will evaluate it in that manner, because it is our conception and construction of the record that that is one of the two values which this court must fix.

I assume, although the decision doesn't say so, in part the determination of whether or not the fee you fix is [11] reasonable will be weighed in the light of the value which you fix on the Indian's interest, because that is one of the elements.

If Judge Preston feels that this court has the right to override the discretion vested in the Secre-

(Testimony of Benton Beckley.)

tary, I will cite you the case of the Cleveland Clinic Foundation v. Humphreys, 95 Fed. 2d 858, in which this terse statement is made from Colton v. Colton, 127 U.S., at page 322:

“The power fixed in the trustee will not be disturbed by the court in the absence of bad faith or fraud.”

Certainly the exercise by the Secretary of the Interior of discretion as to whether or not he will permit the sale of allotted property, or as to whether or not he will permit a lease of allotted property, could not be called either bad faith or fraud. That is the very source and the very agency in which Congress has vested the authority to exercise the discretion. There is no issue here that there has been any abuse of that discretion, or anything of that kind.

I think under those circumstances I should be permitted, and I will say, your Honor, I am not going to attempt to interrogate this witness on all the matters I interrogated him on in the deposition, but you realize in a matter of that kind you explore various things that you don't intend to reproduce in whole in court. I just want to ask this witness [12] a relatively few questions, but I think, in the light of the decision of the Court of Appeals, that I am entitled to interrogate this witness, and any evaluation witness who is proffered, as to whether or not he considered and evaluated the Indian's interest and to define, as I say, what the Indian's interest is.

(Testimony of Benton Beckley.)

Mr. Preston: May it please the Court, in the first place, the opinion does not require this court to find a set, fixed valuation of this property. It says you are to weigh the value of the Indian's interest as one of the many factors entering into the problem, but to come to an exact amount I don't think it is necessary. Judge Mathes ruled from the bench two or three times that limitations above or below would be sufficient to fix a dollar value. I don't think you are required to come to a dollars and cents valuation of these lands. You are only to consider the value as one of the elements involved.

As for the other situation, counsel misunderstands the problem, as I see it. The problem here is that the Government is before the court. The Government is represented by counsel here, and the Government represents the Indian and the Government. They are all before this court. They are here asking you to declare that when the Government lays its hand on an allotment, that it depreciates the title and depreciates the value of the property. [13]

He is asking you to absolutely hold that the Government's action is a detriment and an injury to the Indian's title. That is not the law.

The law will presume that the Government will act in good faith from the inception of a transaction until it is over, that it has no interest in the lands, that it has no duty to perform except for the Indian.

I say that the Government cannot lawfully be

(Testimony of Benton Beckley.)

heard to debase the title of the property and then ask the witness to go out and see how much this property is worth when the Government won't agree to let you sell it, won't agree to let you mortgage it, won't agree to let you lease it, won't agree to let you do anything with it that the Government doesn't want you to do.

He is asking you to capitalize their breach of trust. That is exactly what they are trying to do in this case. I say no witness can give money value on a piece of property that cannot be sold. It has no market value. There is no market value in it.

Therefore, it is only the inherent value to the Indian that can be measured in this case.

The Court: As a matter of fact, how do you go about to determine that?

Mr. Preston: How would you go about to do that?

The Court: Yes. [14]

Mr. Preston: The market value with a fee title.

The Court: Fee title?

Mr. Preston: Fee title, using that as a basis to derive the value to the Indian. That is the only way you can do it.

So I have asked this witness. He has testified and, of course, he has done it on the assumption that there was a fee title there that could be sold.

Now, they ask him, "How much would you cut it down if you couldn't lease it, and how much would you cut it down if you couldn't sell it?"

I say that is out of bounds and it is not germane

(Testimony of Benton Beckley.)

to the issue before this court. The issue before the court is, what is the value of this property to this Indian?

Mr. Brett: If the Court please, first, with reference to what your Honor's duty is, insofar, at least, as the Court of Appeals has defined it, I will ask the clerk to hand up our volume of 181 Federal 2d, and I think you will find the Court of Appeals used the word "determine."

Mr. Preston: Yes, but by using value as one of the factors.

Mr. Brett: "* * * in so doing should have considered and determined the value of the thing secured by the litigation."

That is the thing which the lawyers brought to the client, namely, the reasonable value of the Indian's interest [15] in the allotted land under the trust patent.

On that point, I submit that the use of the word "determined" would mean more than merely giving it consideration, and it would mean you would have to come to some determination of value.

Judge Preston refers to our debasing something. If the Court please, let's eliminate the Indian for a minute and assume what we have before the court is the evaluation of a life estate. Say the person has received an interest through the will or some trust and has a life estate. He can use it. He can dispose of it to the extent of his interest, lease it to the extent of his interest, but beyond that he can't do anything.

(Testimony of Benton Beckley.)

The Court: What is his interest?

Mr. Brett: Then, under those circumstances, would you say and could Judge Preston possibly say to you, as the court, that if the lawyers on the other side were seeking to have the valuation to be of the life estate, other than a fee, that because of the fact or the manner in which it was created, it was not a fee, that it is being debased?

What the Indian has received under the law, and I can't change that, and I submit the court can't change it, is a life estate in this property. He has a limited right of use of the property. In certain respects, he has an exclusive right to use it. He can use it himself. He can permit others [16] to use it under limited conditions, that is, he may lease it for ten years for grazing or agriculture purposes, provided the Secretary of the Interior approves. Or he may lease it for business purposes, that is, income purposes, other than for farming or irrigation or grazing, for five years, and the statute on that is express.

Title 25, Section 403, says he may not do so beyond five years, and I submit that means even the Secretary can't permit him to do it.

Now, that is what he has. That is what these attorneys recovered, because that is all she could get. They can't recover any more than that at the utmost.

In reference to the matter of evaluation, this is no different than many evaluation problems. We always have to assume whatever interest does exist

(Testimony of Benton Beckley.)

is a salable article, because all values are hypothetical. There has been no sale and couldn't be a sale.

So what we have to do is fix the interest. Either in eminent domain or any other proceeding, we first have to define the interest, and then assume that that interest could be sold.

Certainly I know of no rule of law, and I don't believe Judge Preston can cite you one, that you can entirely disregard the limitations. I can't conceive of a valuation of a life estate being made on the theory use of it as only a life [17] estate gives him a fee simple title. There is no magic about it.

All this decision has determined is that the Secretary in the first place should have allotted it to the Indian, and, having decided that, the Indian from that decision had the benefit of the same effect as if it had been allotted. Under those circumstances, if the Court please, I believe that this decision of the Court of Appeals requires you to evaluate it.

Mr. Preston: May I close the debate with one word or two. Why doesn't he use a probate estate? When you are going to appraise it for the purpose of a probate sale, which must be approved by the court, you value the whole title. Why didn't he use a *non compos mentis* case to be evaluated the same as if he had a sound mind? A minor's property would be evaluated the same as if he were 21 years of age.

This thing illustrates itself. You will notice the

(Testimony of Benton Beckley.)

position taken by counsel, he says he has got to assume that the Indian can sell. Did you notice that? You must assume that the Indian can sell his property. Then that is a fee simple title. He says you must assume, then, in order to go into any of these issues, that he wants to go into, you have got to assume that the Indian can sell his property right. I have cited you a case where they held it is a vested right that can't be disturbed. It is protected by the Fifth Amendment. [18]

We have shown you here the Government has no interest in the property. Its sole duty is to the Indian. It doesn't have a nickel's worth of estate in it. It is a fee simple title except for the restriction of alienation, and now Mr. Brett removes that restriction of alienation. He says you have got to assume he can sell what he has got. That should end the argument, because he is admitting that the Indian must be presumed to have the right to sell his allotment, and that gives him a fee title.

Mr. Brett: I guess I have a right to close this now.

Mr. Preston: No, you don't.

The Court: Well, somebody close it. You people have been arguing over and over again. You keep repeating your position to me. I have got to pass on the primary question. Are you through? I want to rule.

Mr. Brett: No. I would like to answer that one phase.

The Court: And then he will answer you, and

(Testimony of Benton Beckley.)

you will want to answer him, and you will be going all night. That is no way to try a lawsuit. I think I have given you enough time to express your opinions.

Mr. Brett: The only thing is, he is misinterpreting what I said.

The Court: Every time one of you says anything, then the other misinterprets it another way. I will say to counsel now—Will you just keep your seat a minute and quit [19] jumping around? It interrupts me.

Mr. Preston: I didn't hear that.

The Court: If you can keep your seat a minute——

Mr. Preston: I can't hear you. That is the reason I am standing, only for that reason.

The Court: The court realizes that the ultimate question here under this decision of the Court of Appeals is, what is the extent of the Indian's interest in this property under this Act of Congress, allowing these Indians these different allotments in this reservation? That ultimately has got to be decided by the court in fixing the value of the attorneys' fees for the services that they have rendered in this suit.

Now, you call a witness here and he is about ready to testify one way or another, with these limitations the Government reserved, its control, and if the alienation of the property is restricted, that, therefore, that depreciates the value of the Indian's interest. I have got to pass on this, if they

(Testimony of Benton Beckley.)

do exist, and if they do, to what extent do they depreciate the value of the Indian's interest in the property which the court passed on but didn't state what it was. The Court of Appeals make a glittering generality in that opinion. They don't tell you and I here what it is, so we can properly try this lawsuit. They put the bridle around both of our necks here and try to get me to decide it. One says it is fee simple interest. One says it is a title with [20] limitations, controlled by the Government. That is the question I have got to determine here in determining the value of the services in this matter in controversy. That is what the Court of Appeals says in that opinion. I have got to determine what is the value of this land, whether reserving the right of control to the Government, or whether the Indians have a right to sell and dispose of this land.

How am I going to determine the value? How are you going to get at the value? An interest in real estate with a limitation on it of control, and denying alienation, is different from a fee simple title with the right to sell and without any interference by the Government. There is a difference there. You both disagree fundamentally on that theory.

I think I had better receive this evidence with the understanding that whatever theory the court will take, the court will make an order striking the balance of the evidence from this record, whatever doesn't substantiate the court's ultimate opinion.

(Testimony of Benton Beckley.)

I have got to do it under this decision of the Circuit Court of Appeals.

One minute they say determine the Indian's interest, then they say determine the matter of the value in controversy, the property, the allotment.

Nothing else is here except the value of the services rendered by the attorneys. We have got to determine the [21] reasonable attorneys' fees to be paid after considering the extent of the services rendered by the attorneys. The Circuit Court of Appeals has made it somewhat puzzling to get at it.

Now, I am going to allow you to question him with the understanding, if the court takes the position against which you are contending for, I will make an order striking the testimony.

Now, go ahead.

Q. (By Mr. Brett): Mr. Beckley, are you prepared today to state an opinion as to the value of the two-acre parcel?

Mr. Preston: You mean as of what date?

Q. (By Mr. Brett): As of today, assuming that you are evaluating the trust patent interest of Eleuteria Brown Arenas, and such trust patent interest is a vested right of the title to the property, but with the restriction that she may not sell the title to the property except with the consent and approval of the Secretary of the Interior, in his discretion.

Mr. Preston: To which we want to make an objection, your Honor. The date involved in this inquiry is 1948, May 18th, I think, and not the

(Testimony of Benton Beckley.)

present day. The present-day value might have some reflection on it, but it is not the date upon which the evaluation is supposed to be made, as I understand it. These services were rendered May 18, 1948.

The Court: Very well. Go ahead. You may answer. [22]

Mr. Brett: I haven't finished the question.

The Witness: The appraisal at the time in 1948, would be eighteen to twenty thousand dollars per acre.

Mr. Brett: I haven't finished the question.

The Witness: Regardless of what it is, whether in trust or fee title, that will cover that.

The Court: How much?

The Witness: \$18,000.00 to \$20,000.00 per acre.

Q. (By Mr. Brett): You mean regardless of any restrictions? A. As of the date in 1948.

Q. Regardless of any restrictions that might appear on the property or its use?

A. Yes, sir. I don't believe the Government will restrict this property in any way to hurt the value of it, and over a considerable time there will be an increase in value, rather than a depreciation. Maybe that will cover all of it for you.

Q. Do you state the same opinion, as far as no change in value between a fee simple title and a restricted title, to either the 5-acre or the 40-acre parcel? A. That's right.

Mr. Preston: You understand we are objecting to that.

(Testimony of Benton Beckley.)

The Court: I understand.

Mr. Preston: We are adhering to the ruling of the court [23] and not interfering for that reason.

Q. (By Mr. Brett): Did you answer "Yes"?

A. Yes.

Q. In other words, no matter what restrictions did exist on either the sale or the use of the property at the date of your evaluation——

A. That is correct.

Q. ——it is your opinion that the value would be no different than it would be if there were no such restrictions? A. That's right.

Q. Now, Mr. Beckley, will you turn to page 97 of your deposition?

A. O.K. (Witness complying.)

Q. Did you not testify on November 9, 1950, in answer to questions I put to you, as follows:

"Q. (By Mr. Brett): Now, I am going to ask you to assume for the purpose of this question that the Indian's interest in these three separate parcels that we have discussed is the right to receive in the future at some unnamed time, and which could not now be definitely determined, a complete fee simple patent, and the right until he or she, or until she receives such fee simple patent, aside from her own right to personal use in occupancy, which would restrict any sale of any kind or any lease of any kind or any [24] incumbrance of any kind—and by 'restricted' I mean prevented, prohibited by law—and would only permit the

(Testimony of Benton Beckley.)

right to give a third party the right of use for residential or business purposes for a term not to exceed five years, and subject to being approved by the Indian Office and subject to revocation—and by ‘revocation’ I mean to be terminated completely upon 30 days’ notice with the consent and approval of the Indian and the Indian Office.

“Now, do you have in mind that set of factors? A. I do.”

A. Yes, I do.

“Q. Now, having that set of factors in mind, and assuming that that is the Indian’s right, are you in a position at this time to give an opinion as to what you believe the value of the two-acre parcel is, that is, of that right in the two-acre parcel, the reasonable market value?”

“A. If those restrictions were put in and were held in force and everybody knew those would be that way for a period of years so it couldn’t be changed, then it would affect the value considerably.”

Did you not so testify?

A. That’s right.

Q. Is that not your opinion? [25]

A. In one way, it is. You put your five years with a 30-day revocation permit, and over the period of years, I don’t believe the Government would restrict this property and try to hold those restrictions which would affect the value.

(Testimony of Benton Beckley.)

Q. Did you not testify, on page 98, in answer to my question, as follows, page 98, line 25:

“Q. Well, now, assuming the same factors, but applying my question to the five-acre tract, would your answer be the same?

“A. The same thing on all of it.

“Q. Would it equally apply, with the same factors, to the 40 acres? A. That’s right.

“Q. In other words, you couldn’t at this time give an opinion?

“A. I couldn’t give an opinion, because there is too many things against it. I just don’t want to commit myself.”

A. We were talking about the property valuation from the present date to 1948.

Q. No. The value of the trust patent I have just described. Did you not at that time testify as I have just read? A. I did.

Q. Is that your opinion? [26]

A. You have it mixed up in there, and it is pretty hard to answer it direct there.

The Court: We will recess until tomorrow morning at 10:00 o’clock, and you can think it over.

(Thereupon a recess was taken until the following day, Tuesday, November 28, 1950, at 10:00 o’clock a.m.) [27]

November 28, 1950—10:00 A.M.

The Court: You may proceed.

Mr. Brett: Mr. Beckley.

BENTON BECKLEY

called as a witness by and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Brett:

Q. When you fixed the values which you stated in the proceeding in court on October 29, 1948, of the 2-acre, 5-acre, and 40-acre parcels allotted to Eleuteria Brown Arenas, you recognized that they were then subject to certain restrictions, both as to the right of sale and as to the right to encumber, didn't you? A. I did.

Q. But you believed that at some time in the future, which time you couldn't definitely fix, that they would be removed so that the property could be sold free and clear of all restrictions?

A. Well, regardless of any restrictions, Mr. Brett, either way, my opinion is still the same. It wouldn't make any difference.

Q. Will you please answer the question? [29]

A. It didn't, according to the restrictions. Is that what you want?

Mr. Brett: Will you read the question, please?

(The question was read by the reporter.)

(Testimony of Benton Beckley.)

The Witness: I believed that the Government at some time or other would have removed part of the restrictions, acting as guardian of the Indian. I don't think they can hold them forever in that status.

Q. (By Mr. Brett): You fixed your value assuming that such restrictions had been removed, didn't you? A. That had not been removed?

Q. No. I say you fixed your values on the assumption that at the time of the sale the restrictions would have been removed?

A. Either way, Irl, whether it had been removed, or whether they were on it. I know sometime or other they would have to be removed.

Q. Didn't you fix your values after they had been removed? A. At some time or other, yes.

Q. In other words, you were fixing the value with the restrictions off of the property?

A. That's right.

Q. I mean you knew that the two-acre parcel is zoned by the City of Palm Springs in what is known as an R-1 zone, [30] didn't you?

A. That's right.

Q. And that limits the use of the premises, of the two-acre parcel in Section 14, to single residences? A. That's right.

Q. And you fixed the value which you gave on October 29, 1948, upon the assumption that somehow, sometime in the future, the zoning would be changed so that the property could be used for business purposes?

(Testimony of Benton Beckley.)

A. Regardless of the restriction, whether it was R-1, or anything, Irl, I based my price on that value.

Q. Will you please answer the question?

Mr. Preston: He did answer it. I submit it is responsive.

The Court: He said regardless of it. That is an answer, isn't it? Do you want him to say it again?

Q. (By Mr. Brett): Now, Mr. Beckley, again I refer your attention to the fact that I took your deposition in Palm Springs on the 9th of November.

A. That's right.

Q. Then we had it transcribed.

A. That's right.

Q. And you took it home with you last week end.

A. I took it home for one night, yes, sir.

Q. And you have examined it? [31]

A. Yes, sir.

Q. And made such corrections as you desired to make?

A. Yes, sir.

Q. And then swore to it before a notary public in Judge Preston's office yesterday morning?

A. That's right.

Q. Is it not true that on page 103, commencing at line 7, that this question was asked you?

"Q. Well, let's put it this way, then: Assuming there was a hypothetical purchaser for the two-acre parcel, and you were representing the Indian as real estate broker to sell it, in fixing your value here, and if that purchaser had asked you, 'Well, now, when is it going to

(Testimony of Benton Beckley.)

be so that I can do these things that you have stated without restriction?' you would have to tell the purchaser, and you assumed you would have had to tell the purchaser, 'I don't know, but I think it will be done.' Is that about it?''

And did you not answer:

"No. I would not even contemplate selling it until the time it could be sold."

And then I asked you:

"You were figuring value at the time it could be sold? A. That's right." [32]

Isn't that correct?

A. All the way through this, I am taking the stand the property can be sold, is that right, at some time?

Q. And you evaluated it at the time when it can be sold?

A. The value of the property is put at the time it can be sold for some cash and you have a buyer and a seller. Is that right?

Q. Mr. Beckley, I don't answer questions.

A. I mean it can't be sold until it is—Well, go ahead.

Q. I just want one answer. You valued this property as of the time when it could be sold?

A. That is correct.

Q. Free and clear? A. That is correct.

Q. Now, Mr. Beckley, I will show you Respondents' Exhibit A, which is a drawing. You have been in Palm Springs since 1936, is that correct?

(Testimony of Benton Beckley.)

A. Yes, sir.

Q. Examine Exhibit A and state if that doesn't, merely for illustrative purposes, illustrate the general location of the two-acre parcel with reference to Indian Avenue and to Palm Springs Drive.

A. That's right. [33]

Q. This two-acre parcel is some 520 feet easterly of Indian Avenue?

A. Five hundred, twenty-eight feet east.

Q. I meant 528 feet. A. That's right.

Q. It isn't located on any existing street that is now being used for business?

A. That is correct.

Q. The nearest street which is being used for business is Indian Avenue?

A. Let's put it this way. There are streets, but I don't know whether they are dedicated or not. Dirt roads, desert roads, we call them.

Q. In other words, there are certain oiled ways in which you can get to these properties?

A. Not oiled. The Government has neglected that for the last 10 years. Let's put it dirt roads.

Q. There are certain dirt roads, but the particular two-acre parcel is at least 528 feet from the nearest street? A. That is correct.

Q. And that is considerably in excess of the depth of any of the lots on Indian Avenue?

A. The lots vary according to who has leased them out, what Indian or the Department. They will vary from 125 to 50 feet in depth. [34]

Q. This particular property, at the time that

(Testimony of Benton Beckley.)

you valued it in 1948, was occupied by small shacks, lean-tos, tents, and other low-valued habitations?

A. That is correct.

Q. And not only it, but the properties surrounding it on all sides were equally so occupied and used?

A. That is close, within 50 or 150 feet, I would say.

Q. With reference to the Respondents' Exhibit A, you will notice that there is shown on all sides of it, an allotment.

A. That is correct.

Q. Those particular allotments that are shown there, 47, 49, 51, and 42, were all equally occupied and used, weren't they?

A. That is correct.

Q. Now, when you gave your value on those two lots of between \$18,000.00 and \$20,000.00 per acre—is that correct?

A. That is correct.

Q. That would be free of all restrictions?

A. Regardless of how it was.

Q. You testified at the earlier hearing that you had sold certain lands in the Palm Springs area, but you have never sold any property in the Indian reservation, have you?

A. No.

Q. So that we can get some relative date, my next few [35] questions are all going to start with January, 1944, and up to the present date; in other words, allowing about six and a half years or almost seven years.

A. All right.

Q. During that period of time, you have never sold as much as one acre in one piece in Palm Springs, have you?

A. No, sir.

(Testimony of Benton Beckley.)

Q. Now, in arriving at your value, you considered certain properties in Palm Springs, as having some comparative value to this land, and derived your value on that basis, didn't you?

A. That is correct.

Q. For example, again referring to Respondents' Exhibit A, I direct your attention to an area which is along Ramon Road—I mean which is along Indian Avenue and just north of Ramon Road——

A. That is correct.

Q. There are a number of developed properties along that area, are there not, business properties?

A. On the reservation?

Q. Business properties.

A. To to the north of Ramon Road?

Q. Yes. A. Yes.

Q. Just north of Ramon Road, as shown on Respondents' [36] Exhibit A, there is an area on Indian Avenue that runs from Ramon Road until Indian Avenue intersects Palm Springs Drive on the south? A. That is correct.

Q. And on the corner, which would be the southeast corner of Ramon Road and Indian Avenue, there is a substantial hotel known as the Miramonte? A. Southwest corner.

Q. Southwest corner? A. That is correct.

Q. That property was a property which had been sold as an operating hotel property?

A. That is correct.

Q. And in part you based your conclusion that the value of these two acres was from \$18,000.00 to

(Testimony of Benton Beckley.)

\$20,000.00 per acre upon your knowledge of the sale of that operating property and the income which had been derived therefrom, didn't you?

A. Not of that hotel, Irl. That is the Miramonte. They had one offer of that, and a man in Alaska wanted it, and they refused to sell it.

Q. Then you based it upon that offer and the refusal to sell?

A. That's right, and also the previous party who owned it, Pliners. [37]

Q. And you based that, as far as that is concerned, upon the income derived from the hotel?

A. Not the income. The approximate income I think would arrive from it from the number of rooms and apartments.

Q. In other words, you based it on your assumption as to what could be the income from that property?

A. We know what rooms are worth in Palm Springs and what they rent for, and you can judge your value by what they should bring in.

Q. Mr. Beckley, I will ask the reporter to read my question and ask that you answer it.

(The question was read by the reporter.)

A. That is correct.

Q. There is another substantially improved property, having a number of units, known as the Voronado Hotel, which was just south of this other hotel, and on Indian Avenue.

A. That is correct.

(Testimony of Benton Beckley.)

Q. And you had knowledge of the transaction under which that was sold as an operating hotel property, didn't you?

A. Not the price paid for the Voronado.

Q. What was it you used?

A. The vacant lot to the north of that. I sold that lot as a vacant piece of property.

Q. Did you not also use the hotel and its income? [38]

A. That's right.

Q. You did use that?

A. I don't know the purchase price of the hotel, though.

Q. But you did use the income of the hotel as one of your bases?

A. That's right.

Q. The lot you refer to was between these two operating hotels and was on Indian Avenue?

A. That is correct.

Q. It had frontage on Indian Avenue?

A. That is correct, 60 feet.

Q. On Indian Avenue. As I understand it, the judge has not had the opportunity of being in Palm Springs. Indian Avenue is the second most important business thoroughfare in Palm Springs?

A. It will be the first in importance if it is widened.

Q. But it is the second now?

A. That is correct.

Q. And the most important business thoroughfare in Palm Springs is Palm Canyon Drive, as shown by Respondents' Exhibit A, between Alejo Road and Ramon Road?

A. That is correct.

(Testimony of Benton Beckley.)

Q. As a matter of fact, Mr. Beckley, this area which is bounded on the north by Alejo Road and on the east by Indian Avenue, on the south by Ramon Road, and on the west by [39] Palm Canyon Drive, is the heart of the business district of Palm Springs, isn't it?

A. It is the heart now, Irl.

Q. At present? A. At present.

Q. And was when you testified in 1948?

A. That is correct.

Q. It is improved with such improvements as the principal hotel, the Desert Inn, which faces on Palm Canyon Drive? A. That is correct.

Q. By Bullock's, a branch of one of the large department stores in Los Angeles?

A. That is correct.

Q. The Plaza, which is adjacent to Palm Canyon Drive, and is shown on Exhibit A, has a branch of Desmond's, one of the leading men's furnishing stores of Los Angeles? A. That is correct.

Q. Shortly above, that would be to the north of Bullock's on Palm Canyon Drive, there is a branch of J. W. Robinson Company, which is one of the main department stores of Los Angeles?

A. That is in the Desert Inn.

Q. Then, in addition to that, there are the Bank of America, all of the motion picture theaters, and practically all, if not all, practically all, of the principal shops? [40]

A. Do you want me to tell you the reason for that?

(Testimony of Benton Beckley.)

Q. No. I am asking you if that isn't true.

A. That is true.

Q. In fixing the value of \$18,000.00 to \$20,000.00 per acre on this two-acre parcel, you considered your knowledge of the sales and of the operation and of the income of the properties within that business heart of Palm Springs, didn't you?

A. That is correct.

Q. Now, I will show you Respondents' Exhibit B, and I will ask you if, for purely illustrative purposes, that does not generally illustrate the location of State Highway 111, which runs to Indio, and of Palm Canyon Drive, extending southerly below Ramon Road? A. That is correct.

Q. And it also shows the general location with reference to those two points and with reference to other allotments, of the 5-acre and 40-acre parcels?

A. That's right.

Q. Now, as to the five-acre parcel, the five-acre parcel has certain small dwellings located on it?

A. That is correct.

Q. And it also has frontage on Palm Canyon Drive of some 330 feet?

A. That's right. [41]

Q. And has a depth of 660 feet?

A. Correct.

Q. The buildings upon the property do not belong to the Indian?

A. Not that I know of today, Irl.

Q. At any rate, in fixing the value, you did not assume that the Indian owned any of them?

(Testimony of Benton Beckley.)

A. That is correct.

Q. That property was likewise zoned by the City of Palm Springs so that the frontage was zoned for residential purposes, R-1?

A. That is correct. There might be a part of it in trailer.

Q. And the rear portion of it was zoned for trailer park?

A. That is correct.

Q. While there is a roadway that runs into the property, dirt roadway, I believe that is oiled, isn't it?

A. Partly.

Q. There is no dedicated road in there?

A. Not that I know of.

Q. That is approximately from one and one-quarter to one and one-half miles from the heart of Palm Springs, isn't it?

A. Yes. [42]

Q. And the heart of the business district?

A. That is correct.

Q. And that property, consisting of five acres, you valued in fee, that is, free of all restrictions, at \$12,000.00 per acre?

A. That is correct.

Q. Now, Mr. Beckley, do you know of any sale of any piece of property that is not within that area that I described heretofore as being the heart of Palm Springs, that is, bounded by Alejo on the north, by Ramon on the south, by Indian Avenue on the east, by Palm Canyon Drive on the west, which does not front upon a business street that is zoned for business purposes, that has sold since January 1, 1944, to date for \$12,000.00 an acre?

A. No, I don't, Irl.

(Testimony of Benton Beckley.)

Q. Do you know of any such property as I have just described that during that period has sold for \$10,000.00 an acre? A. No.

Q. Do you know of any such property as I have just described that was sold for \$8,000.00 an acre?

A. There has been a piece to the south of this, Irl, that has been sold. I don't know for what figure. That is the only acreage I know that has been sold in the Palm Springs area in that vicinity between these dates you put. [43]

Q. At any rate, in fixing the value of \$12,000.00 an acre, you did not personally know and you do not personally know of any such property that I so described sold since January 1, 1944, for \$8,000.00 an acre? A. No.

Q. Do you know of any such property as I have just described that sold for \$6,000.00 an acre during that period?

A. I answered your question on acreage. There have been lots. There has no acreage been sold that I know of, let's put it that way. That will eliminate all of this.

Q. In other words, you don't know of as much as one acre, then? A. That is correct.

Q. Do I understand correctly you don't know of a sale of as much as one acre in that period of time?

A. Not in a whole piece. There have been a few transactions I don't know of and what has gone on. I know houses and lots surrounding that prop-

(Testimony of Benton Beckley.)

erty that have been sold. That is what I arrived at my conclusion from.

Mr. Preston: Surrounding the property?

The Witness: Not surrounding the property. Adjacent to or west of the five acres, put it that way.

Q. (By Mr. Brett): How large are the lots?

A. 60 by 150, 162, 142. They vary. It is rolling land and there are smaller and larger pieces. [44]

Q. How much larger?

A. They run up to 200, 230, by 100 feet. Back toward the mountain there is larger pieces.

Q. But you don't know of any sale since January 1, 1944, of as much as one acre?

A. There might have been, and—No, I don't, Irl, not myself.

Mr. Preston: Did you ask him for the prices on those or not?

Q. (By Mr. Brett): You have also considered, in fixing your valuation on this two-acre parcel in Section 14 and the five-acre parcel in Section 26, that we have just discussed, some duplexes and multiple-building units that are located upon streets just south of Ramon and east of Indian Avenue, haven't you?

A. That is the southern part of Indian Avenue, they are on.

Q. They are shown on Respondents' Exhibit A as Calle Ajo, Calle Encilia, Calle Saint Rosa, and Calle Abronia Aurita, is that correct?

A. Yes.

(Testimony of Benton Beckley.)

Mr. Brett: I don't know whether his Honor is familiar with what we call in California a duplex or not.

Q. (By Mr. Brett): A duplex is a multiple unit where you have one residence above and one below? [45]

A. Not above. There are no two-story buildings in Palm Springs.

Q. A duplex is where you have two residences in a unit? A. Yes.

Q. And a multiple unit would be where you have more than two? A. That's right.

Q. These were improved units that were sold that were being operated for rental to guests who had come to Palm Springs? A. That's right.

Q. And you gave consideration to those improved units and their income in arriving at the valuation of the two-acre and five-acre parcels, didn't you?

A. The income and sale of them, Irl.

Q. And the sale of those units as so improved?

A. The property and the units.

Q. Again examining Respondents' Exhibit B and the 40-acre parcel, the 40-acre parcel is located approximately how far from Ramon Road?

A. Approximately one-quarter of a mile.

Q. And about how far from Palm Canyon Drive? A. Approximately a half-mile.

Q. Although it would have of necessity a way of ingress and egress, there is at the present time no roadway [46] that runs to it, is that correct?

(Testimony of Benton Beckley.)

A. I believe that is correct. There might be a desert road, we classify it. I don't know. They have been dumping trash along it now for the last six months, I know.

Q. You valued that parcel of 40 acres at from \$180,000.00 to \$200,000.00?

A. That is correct.

Q. Which of those figures do you choose? Which is the figure that you believe is the value?

A. I would take the \$200,000.00.

Q. \$200,000.00? A. That is correct.

Q. That would be \$5,000.00 per acre.

A. That is right.

Q. Do you know of any pice of land, which is not on any street, that is not contiguous to and adjacent to any street, which has sold since January 1, 1944, for \$5,000.00 an acre?

A. Irl, there may have been maybe two or three large pieces rather close to this property, privately owned property, which have not been up for sale, owned by two or three individuals in Palm Springs. As far as acreage, it is pretty hard to find any acreage in the Palm Springs area.

Q. Is your answer to my question "No"?

A. No. Read that over again. [47]

Mr. Brett: Will you read the question, please?

(The question was read by the reporter.)

The Witness: No.

Q. (By Mr. Brett): Now I have a rather long

(Testimony of Benton Beckley.)

hypothetical question. I have had a copy made of it.

A. Can't we break these down into smaller question and I can answer yes or no?

Q. I am going to read this to you.

Assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his [48] authorized representative; that she is entitled to receive the income derived from such leases unless the Secretary of the Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period ex-

(Testimony of Benton Beckley.)

pires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell and may not encumber her interest under such trust patent to any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion, would be the fair market value [49] of such interest in said 2-acre tract?

Mr. Preston: Just a minute. May it please the Court, I assume this is along the line of the discussion we have already had in this matter, but I desire to object to this question upon the ground that it does not properly characterize the Indian's interest. The interest of the Indian, as set forth

(Testimony of Benton Beckley.)

in the decision in this case, and in the footnote quotations and the statements that I made I cited to the court, gives the Indian a fee simple title in an equitable estate. The Indian has in all essential respects a fee simple title with the right of alienation restricted. This question is objectionable for that reason, but more objectionable for a further reason.

In order for there to be a fair market value, there must be a seller, and a willing seller, and a willing purchaser, and the willing purchaser must be willing to buy with full knowledge of the facts, and the seller must be willing to sell with full knowledge of the attributes and qualities of the property.

Now, when this Indian sells, he sells the whole title or nothing. It can't be true that a purchaser from this Indian would still be under guardianship by the Government and his rights under restriction by the Government at all. So when you ask the witness a question which does not permit the Indian to sell what he has, you are getting what is known in [50] the law as a *felo de se*. The question destroys itself, because it can't be true that the assumptions made here are correct and still the Indian have a right to sell his property.

With that exposition of my views, at least, of what the law is in this matter, this question is objectionable because it destroys itself. It can't be true that the Indian can sell his land and still the purchaser be bound by the same covenants and

(Testimony of Benton Beckley.)

conditions that the Indian is bound by now. That couldn't be. That is an impossibility and it is a monstrosity, besides, and as I said before, it is a question that suicides itself and is not a proper question for the consideration of this court.

Mr. Brett: I say first, your Honor, it is my understanding your Honor had indicated yesterday, since you are going to have to later determine the legal question, you are going to hear the evidence and later rule. That was my purpose. However, very briefly, I will state this: This does describe specifically—and before we get through here, by citation or by evidence, I will be able to show your Honor that it does specifically and exactly describe the exact status of the property which we have got to value.

Judge Preston is right in saying such an interest couldn't be sold any more than you could sell a public bridge or park, or something of that kind, but in those instances in which you are required to place a value, you have to assume whatever [51] that is, whether it is a limited or a full interest. You assume there would be a willing seller and a willing buyer, but what is being sold is being evaluated with whatever may be the limit on the interest.

That is what I understand the Court of Appeals has directed. It may be, after your Honor has considered the matter, you will rule to the contrary, and, as I understood yesterday, if you do so rule you will strike this testimony out. However, we will have it in the record if we desire review.

(Testimony of Benton Beckley.)

If you don't let it in, there is nothing before the court to review, so I want his answer or his statement that he can't answer, and then your Honor will subsequently rule after we close this matter.

Mr. Preston: I want my objections to be understood by the court, and perhaps he does understand this better than I do now, but, as I understand this situation, this Indian is now going to sell what he has under this question, and if he is going to sell what he has, that is begging the question, because he is going to sell a legal title, because all the interest of the Government is to keep him from selling, and these other restrictions all fade away when the sale is made to a purchaser. Every restriction that is on the land is embodied and contained in the restriction of the sale, and when the restriction on sale is removed, it removes every [52] restriction, and this witness, all he could do in the world under such a question would be to say what he said already.

I don't want to put any answers in his mouth, but this question is self-destructive, because it is based on the very proposition that is impossible for him to perform, and if he can perform it he has a fee title.

The Court: As the court stated yesterday, I reserve the right to rule on what I consider one of the primary questions in determining the rights of the Indian and how to determine the valuation of this land. I reserve the right to rule on that after the case has been finally argued and submitted to

(Testimony of Benton Beckley.)

me for further consideration, and I do so now in regard to this hypothetical question.

You may go ahead and answer, but with the understanding, as I stated yesterday if the court reaches the conclusion that the answer was improper, it will be stricken from the record. If not, it will stand and I will have the full record before me, and so will the reviewing court, if it goes any further, so they can decide this case and bring it to an end some day on what constitutes valuation of the interest of the Indian. I think that is the way to do.

I will say to counsel now, I *don't* *how* you think, but could arrangements be made so that the reporter could furnish me a copy of this hypothetical question and your objections and your argument on the question here now, thus boiling it [53] down on that one primary question? That would help me in having it before me when I take this case under consideration, which I am going to do. It is not going to be decided right from the bench, because I am not prepared to do so until I hear the whole case and the arguments of counsel. Can you make arrangements so that the reporter can furnish me with a copy of that part of the record?

Mr. Brett: I can never answer that question categorically, but I feel I can and I will.

The Court: It isn't very long. I want just your objections and your arguments pro and con right now on this question, because you are boiling it down pretty close on that question.

(Testimony of Benton Beckley.)

Very well, then, with that understanding I will reserve ruling and let him answer this question.

Mr. Brett: One other thing, your Honor. In order not to extend this matter, as we did yesterday, I desire no further argument, but I understand your Honor is going to permit me to cite authorities and make an argument later.

The Court: Yes. When you submit the case finally, I will give you time to file briefs, of course.

Mr. Preston: Is it your Honor's idea you will need no more of the record than this?

The Court: I may call on you for more of it. I don't know yet. I said that as to this particular question, because [54] you are boiling this down pretty close on this question. There may be other parts of the record I will want.

He may answer the question now.

The Witness: I cannot answer this question, Mr. Brett. I would rather hold—there are too many little “ifs” and “ands.” But I will say my judgment on the price, with or without restriction, is still going to stand at \$200,000.00. If this case goes on for another five or ten years, it will go to \$400,000.00, because I know this property is going up in value every day in Palm Springs, and since this trial started the value has doubled or trebled.

You can't move the land now, unless it is moved like they have done it a few places on the reservation. If it stands as it is today, it will be \$200,000.00. In another ten years, it will be double. Palm Springs has gained at the rate of 10 per cent a year.

(Testimony of Benton Beckley.)

The town is going ahead. It isn't going backward. That probably doesn't answer you, but——

Mr. Preston: The question calls for an evaluation of all three of the tracts.

The Court: This \$200,000.00 relates to the 40 acres?

Mr. Brett: Yes, that is right.

Q. (By Mr. Brett): Is your answer that the value of that interest that I have described in the hypothetical question of the two-acre parcel would be from \$18,000.00 to \$20,000.00?

A. \$20,000.00 per acre. [55]

Q. What, in your opinion, would be the fair market value of such interest in the five-acre tract?

A. It will remain the same, \$12,000.00 an acre.

Q. And what in your opinion would be the fair market value of the 40-acre tract?

A. \$200,000.00.

Mr. Brett: If you will pardon me just a minute, I am about through with the witness.

The Court: Let me see if I have this. As to the two acres, you fix a value of \$12,000.00?

The Witness: \$20,000.00 per acre.

The Court: And as to the five acres?

The Witness: That would be \$12,000.00 per acre.

The Court: And as to the 40 acres?

The Witness: That would be \$5,000.00 per acre.

I might say this, too, Irl. You have been on this agriculture business and grazing land. If you want to classify it as agriculture and put grapes in there,

(Testimony of Benton Beckley.)

after three years, with an investment of \$12,000.00, it will net your figure easy, which they have been doing within twelve or eight miles of this same property, farther south, without any easements or rights-of-way, or anything, if you want to use it for agriculture or grapes.

Q. (By Mr. Brett): Did you not testify in the deposition I took on November 9th that the values of land in Palm Springs [56] had depreciated during the last couple of years?

A. There was a leveling-off period there, and that was due to the Korean War and different situations, building restrictions on swimming pools and golf courses, and things like that, and that has to be taken into consideration on today's value at the time of the sale.

Q. You did testify valuations had depreciated zero to 20 per cent?

A. That is today's market, in my judgment. That was not 1948. That was an approximate figure.

Q. You have been associated with these petitioners in various matters in connection with Palm Springs, haven't you? A. That is correct.

Q. You were assisting them in connection with their efforts to have certain allotments made?

A. I was in it before they came into it.

Q. And with your knowledge and consent, you were designated as a collecting agent to whom monies were to be paid for the use of lands allotted to or claimed for allotment by Indians that they represented?

(Testimony of Benton Beckley.)

A. There was never no collections made that I know of. They asked me one time, and I think served notices, but I don't believe, to my knowledge, that there was ever any monies collected.

Q. But you did agree to their making arrangements that [57] you be the collecting agent?

A. I would, yes, sir. I did the same thing for Lee Arenas, for Marcus Pete, through court, and I did collect for Lee Arenas at the time of his trouble with his wife, which was handled through the bank and an accounting made. I was bonded.

Mr. Brett: Will you mark this as Respondents' Exhibit C for identification?

The Clerk: Respondents' Exhibit C for identification.

(The document referred to was marked Respondents' Exhibit C for identification.)

Q. (By Mr. Brett): I will show you a photographic copy of a letter addressed to Jas. L. Bowers, P. O. Box #552, Palm Springs, Calif., dated December 28, 1948, signed by the name "Oliver O. Clark," and you recognize that as petitioner Clark's signature? A. That's right.

Q. And it contains a statement therein that——

Mr. Preston: You don't need to tell him what the letter is. Let him read it. It isn't in evidence, anyway. It is what somebody else wrote.

Q. (By Mr. Brett): There is a reference in there to making remittances to Benton Beckley, P. O. Box #1000, Palm Springs, California?

A. That is correct. [58]

(Testimony of Benton Beckley.)

Q. That is you? A. That is correct.

Mr. Brett: I offer this in evidence as Respondents' Exhibit C.

Mr. Preston: If your Honor please, he has already admitted that.

The Court: Have you any objection?

Mr. Preston: It doesn't make any difference. It is somebody else's letter.

The Court: Overruled. It may be admitted.

The Clerk: Respondents' Exhibit C in evidence.

(The document heretofore marked Respondents' Exhibit C for identification was received in evidence.)

Q. (By Mr. Brett): When did you last see any activity in real estate activities in Palm Springs?

A. I am still in it, but not working at it as a profession or trying to make a living at it. I do sell a few pieces off and on. I have sold a few in the last month. I am not active in real estate. I still retain my license and do some real estate business.

Q. You are familiar with the sale of a piece of property that is practically across the street from your property, aren't you?

A. It was not a sale. It was offered for sale and it has been held at that price, sir. [59]

Q. Where is that located?

A. That is on your State Highway 111, about two miles south and east of Palm Springs.

(Testimony of Benton Beckley.)

Q. How much is that acreage?

A. They are offering that at \$30,000.00.

Q. What is the amount of the acreage?

A. I don't know the exact amount. Around eight or nine acres. It runs back over the hill there, which is not in a definite set piece of acreage.

Q. It is from eight to nine acres of ground?

A. Eight to nine acres of ground at \$30,000.00.

Q. At \$30,000.00. For how long?

A. Just within the last month. Previously it was offered for \$42,000.00.

Q. For how long?

A. For about six to eight months.

Q. And that has frontage on this main highway,
111? A. That is correct.

Mr. Brett: That's all.

Redirect Examination

By Mr. Preston:

Q. Mr. Beckley, you were asked about the heart of the business district of Palm Springs. What in your opinion is the likelihood of that business area extending itself in all directions that are available? [60]

Mr. Brett: I object to that as not proper re-direct examination. I did not in any sense interrogate the witness as to his prognostications with reference to the business district.

Mr. Preston: But he has a right to fix his values, I think, in view of what he thinks are the potentialities.

(Testimony of Benton Beckley.)

The Court: Overruled.

The Witness: Palm Springs lies in an area which to the west is a mountain area, going straight up, and the only way the city can develop is to the east on Section 14.

Q. (By Mr. Preston): That is these Indian lands?

A. The Indian lands, and they have been held back by the restriction that the Department has put upon them. Even at that, they have gone ahead and the white people have made plenty of money over the Indian property and they are still making it over these Indian leases with the restrictions.

Mr. Brett: If the Court please, I move to strike the testimony upon the ground that it is in no manner responsive to the question. The question was, "What in your opinion would be the development of the business district?" and his answer was entirely directed——

The Witness: It would have to be——

The Court: Wait until counsel gets through.

Mr. Brett: His answer was with reference to certain alleged activities on the Indian reservation and did not in [61] any sense refer to or describe or define his conception or opinion.

The Court: Sustained.

Mr. Preston: As to all the answer, your Honor, or just part of it?

The Court: Not all of it.

Mr. Preston: He said the growth of the city would have to be in the direction of these lands.

(Testimony of Benton Beckley.)

The Court: That may remain. See if you can't straighten this out.

Q. (By Mr. Preston): Will you state your reasons for the statement in regard to your opinion with regard to the potentialities of Palm Springs in the matter of expansion?

A. It would have to be to the east of Palm Canyon Drive and Indian Avenue, due to the mountains on the west of Palm Springs.

Q. What, if anything, has been done toward the widening of Indian Avenue?

A. Maps were made, and laid out and surveyed. They were presented before, I believe, Congress, if I am not mistaken, or the Senate, some committee, for the widening of Indian Avenue to 100 feet. There has been a bond issue. The money is in the bank for the paving of Indian Avenue, but has been held up by the Department of Interior.

Mr. Brett: Just a minute. I move to strike that, if the [62] Court please. Naturally, I couldn't anticipate the answer. I move to strike it out as not the best evidence and as a conclusion of the witness.

Mr. Preston: He had a right as an expert witness to state what assumptions he made with reference to the widening of Indian Avenue.

The Court: What the Department has done——

Mr. Preston: How is that?

The Court: As to what the Department has done?

(Testimony of Benton Beckley.)

Mr. Preston: There has been an act of Congress, your Honor.

The Court: It may remain.

Q. (By Mr. Preston): What assumption, if any, did you make with reference to the removing of restrictions off of the Indian area?

A. At some date they would have to be removed——

The Court: Did you ask him as to what has been done?

Mr. Brett: No.

Mr. Preston: What I am trying to get at is, he has testified as to values, and I want to ask him what assumptions he used in making his opinion.

The Court: He may do that.

Mr. Preston: Is that permissible?

The Court: Yes.

The Witness: Through the growth of the city, it would [63] have to be to the east. Does that answer that? The business growth would have to go to the east on the reservation, Section 14.

Q. What assumption, if any, did you make with reference to the moving of the business property in the area?

A. With the widening of Indian Avenue, which will eventually have to be done, due to traffic conditions, the business area will be on Indian Avenue.

Q. Is it or is it not your opinion Indian Avenue would in such event become the principal street of the city?

A. It will in time.

Q. Has there been any sale of property zoned

(Testimony of Benton Beckley.)

on Indian Avenue within this business area that is described by counsel, that has been sold lately?

A. There has been one piece sold to Safeway. It was sold to a company, and the reported price is around \$108,000.00 for 50 feet on Indian Avenue through to Palm Canyon, with 100 feet on Palm Canyon. That price, I haven't checked, but that is generally stated among the real estate men in Palm Springs.

Mr. Brett: I move to strike that, if the Court please, on the ground that by no possible consideration could it be competent to any of the valuations which are admissible in this case. His description of it is of a business area zoned for business, which he previously described. The nearest of any of these properties to the business area is 528 [64] feet. The other properties are a mile and a quarter or a mile and a half away from it. Any property, if the Court please, that would be of an entirely different character from its permitted use and in an entirely different location, would not be competent under any circumstances.

It would be just the same as permitting in evidence some transaction with reference to land in Los Angeles or land at some other place.

If it is zoned entirely different, as he testified, that is business property, and it is within the area he described, it is at least 528 feet from the two-acre parcel, and a mile and a quarter from any other parcel. I submit this should be stricken.

Mr. Preston: A witness who is an expert on

(Testimony of Benton Beckley.)

values makes up his opinion on the sale and purchase of other property in the vicinity. This property is 528 feet from our property, the two-acre tract in Section 14. He has already testified that the city, in his opinion, will have to move in that direction, that this area will have to be classified as a business area, that he assumed, in making up his opinion of values, these facts to exist, and I am asking him if it is not a fact that a sale has been made of business property within 528 feet of this property.

Mr. Brett: Your Honor, may I ask him one question on voir dire before you rule? [65]

The Court: Yes.

Voir Dire Examination

By Mr. Brett:

Q. Mr. Beckley, when in point of time did you believe that Indian Avenue was going to be widened and that Section 14 was going to be rezoned as business property?

A. As far as rezoning, Irl, I can't say anything on that, because I don't know, but I know on zoning, and you have been hitting that pretty strong, there have been variances made in the zoning. There are three in the papers right now for the Indian reservation. There is one from a golf-driving links to a trailer park. So the zoning I do not take into effect too much.

Now, the other question, the widening there, that

(Testimony of Benton Beckley.)

has come up in Palm Springs for the last seven or eight years and they are still trying to figure out a way to take care of the traffic. If you were in the town last week end, you couldn't get on the main street.

Q. My question was when.

A. That has been for the last five or six years under consideration.

Q. When do you think that is going to take place?

A. I couldn't tell you that, Irl. That is up to the Department.

Q. Up to the Government, you mean? [66]

A. That is my opinion.

Mr. Brett: Then I renew my objection. Certainly, it would be incompetent to consider on the theory of something that he can't prognosticate even in an opinion as to the time when it would take place. His opinion would be dependent upon the action of some other body that certainly the Indian couldn't control.

The Court: Sustained.

Redirect Examination

(Resumed)

By Mr. Preston:

Q. Mr. Beckley, take the property known as the five-acre tract, south of the Palm Springs business district. What is the nature of the development on the west from that property?

A. The west is the very highest dwellings,

(Testimony of Benton Beckley.)

finest people; your Bank of America man, Gianini, and all of them, live in that locality.

There is, also, in that area, in the south part, the Del Monte, and hotels of the finest quality.

Q. When you spoke a while ago of lots having been sold over there do you know the price of the lots in that area?

A. There have been lots up to this 1948 period from \$1,800.00 to \$3,400.00, small lots. I would say they would run four to five lots to an acre, according to the size.

Q. Run what?

A. The lots in size would run four to five to an acre. [67]

Q. And they run to what prices?

A. \$1,800.00 to as high as \$4,500.00 and \$4,700.00.

Q. What is the distance between that location and this tract?

A. Just the street between them.

Q. Take the 40-acre tract. Has there been any development near it?

A. There has been development in the last three to five years. There has been the Hotel Biltmore built within 1,300 feet, which is valued at over a million dollars.

Q. La Plaz was sold within a year and a half ago for \$365,000.00, within 1,320 feet of it.

You have your Deep Well Ranch which fronts on your highway, but the main buildings set

(Testimony of Benton Beckley.)

back, close to 500 feet, with an approximate value of over a half million dollars.

Q. Are these factors you took into consideration?

A. That's right. To the west of that, there are subdivisions, motels and hotel units.

Q. And the real estate market is brisk or dull?

A. It is dull now due to restrictions on building.

Q. In 1948, what about it?

A. It was fairly good, fairly active. There was a little spurt in September and October. There was quite a few sales made. Since that time it has slackened off.

Mr. Preston: I think that's all, unless my associate has [68] something more.

Recross-Examination

By Mr. Brett:

Q. This area that is immediately across Palm Canyon Drive, where you stated there were certain lots sold, is unrestricted in the sense it has no Indian restrictions on it?

A. That is correct.

Q. It is white-owned land?

A. That is correct.

Q. When did you assume the restrictions on the five-acre and 40-acre pieces would be removed?

A. I have no idea.

Q. You have no idea? A. No.

Q. Whether it would be one year or ten years?

A. That is correct.

(Testimony of Benton Beckley.)

Q. These hotels you referred to, when you gave values of one million dollars and so forth, you mean after they had been improved?

A. That is correct.

Q. You are not talking about the fact that the land sold for any price like that?

A. Your land would be approximately half the value I appraised them at. That is what they are determined by.

Q. Those lands are also unrestricted, white-owned lands? [69]

A. That is correct.

Mr. Brett: That's all.

Mr. Preston: That's all.

The Witness: May I be excused to leave now? I have got a long way to go.

Mr. Brett: I am through with him.

Mr. Preston: I dislike to see you go, but it's all right.

The Court: They say you can go.

The Witness: Thank you.

(Witness excused.)

Mr. Preston: We offer in evidence, if your Honor please, and solicit a stipulation from counsel that this document is a map of Section 14 and at least official or semi-official, being the map that was used by the Government in the matter of allotments of the Palm Springs Indians in Section 14. It shows the relative position of the lands in question here and the streets that we claim, or easements, rather, that exist on the official map that were not

in Exhibit A. We ask that that be received in evidence as our Exhibit No. 9.

Mr. Brett: It is stipulated it may go in evidence, your Honor. We have no objection.

I want to make it clear Exhibit A and Exhibit B are purely for illustrative purposes. In so stipulating to this last, I do not stipulate that those streets are in place that are shown there or that they are dedicated. [70]

I do stipulate that that is a correct reproduction of a grid drawing, which was prepared by the Indian Department and which was used in connection with the allotment program.

Mr. Preston: The allotments were made with reference to these easements noted on this map.

The Court: It may be admitted without objection, then.

The Clerk: Exhibit 9 in evidence.

(The document referred to was marked Petitioners' Exhibit No. 9 and received in evidence.)

Mr. Preston: We have also a composite map we have shown counsel, which shows all three of the pieces of property involved in this litigation and their relative position toward each other, and for illustrative purposes we would like to have that received in evidence. It is a better display of the true situation all in one composite sheet than we have in these other two sheets. It has got the word "Brown" on it where Brown exists. Where the

word "Adjudicated" appears, it is both Brown and Lee Arenas.

The Court: It may be admitted and received in evidence.

The Clerk: Petitioners' Exhibit 10 in evidence.

(The document referred to was marked Petitioners' Exhibit No. 10 and received in evidence.)

Mr. Preston: Your Honor, we have one other witness, but, as I explained to the court yesterday, he is testifying as an expert in Santa Ana, and my information is he can't be here [71] until 2:00 o'clock, but Mr. Brett said he will take over and put in some of his case, if the court wants to hear it.

The Court: Very well.

Mr. Brett: Is that satisfactory with your Honor?

The Court: Yes, that is satisfactory.

Mr. Brett: Mr. Evans.

BERNARD G. EVANS

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Bernard G. Evans.

Direct Examination

By Mr. Brett:

Q. Mr. Evans, you testified in this same proceeding in October, 1948? A. Yes.

(Testimony of Bernard G. Evans.)

Q. Where do you reside?

A. San Bernardino, California.

Q. What business are you engaged in?

A. Real estate broker, real estate appraiser and subdivider.

Mr. Preston: I will stipulate that his qualifications given at the other hearing may be considered as a part of this testimony.

Mr. Brett: That is acceptable. That is contained, if [72] the Court please, in Petitioners' Exhibit 8.

Mr. Preston: Beginning on page 251.

Q. (By Mr. Brett): Upon my direction, did you revisit Palm Springs within the last two weeks for the purpose of inspecting these properties since they have been trust-patented? A. Yes.

Q. And did you take any pictures of the properties and their surroundings?

A. Yes. I took quite a few last week. I took some prior to that time and some in 1948.

Q. Did you make any further investigation in the way of consulting with others and interviewing others regarding information as to the developments in Palm Springs and the status of the market?

A. Yes, I did. I spent a day and a half in Palm Springs about three weeks ago, and I spent Monday afternoon and all day Tuesday of last week refreshing my memory on these properties, and contacting properties, property owners, subdividers and businessmen of Palm Springs.

Q. Were you informed, as distinguished from

(Testimony of Bernard G. Evans.)

the situation which existed in 1948, at which time portions of these properties were subject to what is known as revocable permit, the trust patentee could now execute firm five-year leases for business purposes? [73] A. Yes.

Q. Did you inform yourself as to the text and contents of the existing zoning ordinances of the City of Palm Springs? A. Yes.

Q. Will you state briefly whom you interviewed on this last investigation with regard to informing yourself about the status of the market in the Palm Springs area?

A. I called on Mr. Fred Ingram, whom I have known for many years, who is the vice-president and manager of the Bank of America in Palm Springs.

I called on Mr. Raymond Cree, who is a real estate broker and formerly represented my firm in Palm Springs in 1925; and Mr. Culver Nichols, who is a real estate subdivider and developer and has been, I think, for some twenty years past.

I talked to John W. Williams, subdivider, property owner, and developer, real estate broker who has been in Palm Springs I believe, for 25 years; Billy Wright, who is a broker and an officer of the Coachella Valley Savings and Loan Association.

I called again on Mr. Perdew, the local agent of the Indians at Palm Springs, and Mr. Peter Sheptenko, who is a broker and property owner in Palm Springs.

Also Mr. Harold Hicks, with whom I have been

(Testimony of Bernard G. Evans.)

acquainted for some twenty years last past, and an active property owner, broker and developer in Palm Springs.

I also called on Mr. G. M. Minturn, city engineer of Palm [74] Springs, and Mr. Woodman, who is the director of the City Planning Commission of the City of Palm Springs, and a number of other brokers, salesmen, whose names I do not now recall, but principally in the offices of these brokers that I have enumerated.

Q. And did you find that the Chamber of Commerce of the City of Palm Springs had issued a map which was being used by various brokers there as the map of Palm Springs? A. Yes.

Mr. Brett: Will you mark this as Respondents' Exhibit D for identification?

The Clerk: Respondents' Exhibit D for identification.

(The map referred to was marked Respondents' Exhibit D for identification.)

Q. (By Mr. Brett): Is this map which I show you, and which has been marked Respondents' Exhibit D for identification, such a map?

A. Yes. I am not sure who publishes it. I think it is issued by the Chamber of Commerce and sponsored by the various business firms in town.

Q. This particular one was sponsored by Culver Nichols, one of the men you interrogated?

A. Yes.

Q. It shows, among other things, some of his

(Testimony of Bernard G. Evans.)

developments in the area, which are surrounded by a red border and [75] by lettering and by designated symbols? A. Yes.

Q. And you investigated those properties, as well as others, in your investigation?

A. Yes. I mean I am very familiar with a good many of those properties, and many of those were developed by Mr. Nichols' father-in-law, O. T. Stevens, who is one of the real old-timers of Palm Springs.

Mr. Brett: I will offer this in evidence as Respondents' Exhibit D.

The Court: Admitted.

The Clerk: Respondents' Exhibit D in evidence.

(The map heretofore marked Respondents' Exhibit D for identification was received in evidence.)

Q. (By Mr. Brett): Now, Mr. Evans, you were informed that we desired that you determine a value as of the present date, as well as the value which you had theretofore given? A. Yes.

Q. And until the court had ruled upon the matter, we desired you fix a value both of a fee simple, which would be free of all restrictions, as far as the Indian is concerned, as distinguished from zoning restrictions, and a value of the Indian's interest in the property under her trust patent?

A. Yes.

Mr. Brett: Mr. Clerk, will you mark these vari-

(Testimony of Bernard G. Evans.)

ous [76] photographs seriatim by the next letters for identification?

The Clerk: Respondents' Exhibits E and F for identification, photographs.

(The photographs referred to were marked Respondents' Exhibits E and F, respectively, for identification.)

Mr. Brett: In order to go along and save time, your Honor, may I proceed with these first photographs while the clerk is marking the others, and have him announce the identification letter when I take each one?

The Court: Yes.

Q. (By Mr. Brett): I will show you a photograph, which has been marked Respondents' Exhibit E for identification. Did you participate in the taking of that photograph?

A. Yes, I took the photograph.

Q. Where did you take that photograph, and when?

A. This was taken from a dirt road which runs north and south through Parcel 50, the two-acre parcel, Parcel 50.

Q. That is the two-acre parcel?

A. In a north direction.

Q. Is that a fair portrayal of the conditions that existed at the time you took the picture?

A. As to that portion of the property, yes.

Q. On what date was that?

(Testimony of Bernard G. Evans.)

A. That was taken on last Tuesday, a week ago today, the 22nd. [77]

Q. November 22, 1950? A. Yes.

Q. And is that substantially a fair portrayal of the conditions as they existed when you were on the property in October, 1948?

A. Yes. There has been very little change since 1948.

Mr. Brett: I will offer this in evidence as Exhibit E.

The Court: Admitted.

The Clerk: Respondents' Exhibit E in evidence.

(The photograph heretofore marked Respondents' Exhibit E for identification was received in evidence.)

Mr. Brett: Does your Honor desire to have these passed up to you, or do you want to examine them later?

The Court: It doesn't make any difference.

Mr. Preston: I would like to make a statement, and after I make that statement I don't care if they are admitted or not.

This Section 14 is covered with shacks. That is admitted and no one disputes it. But it is not proper to consider that this is the result or action that has followed the trust patents. The trust patents have not been issued, your Honor, yet. There are many conflicts in them, and there is an over all lawsuit pending in this court now for the correction and the adjudication of the allotments. There has

(Testimony of Bernard G. Evans.)

been no opportunity for the Indians, or for anybody else, to improve the allotments since the allotments were made. These were the [78] conditions that the Government itself suffered to exist on this property and shouldn't be to the prejudice of these petitioners or to the prejudice of anybody, unless it is the United States Government.

Mr. Brett: Your Honor, these are offered for illustrative purposes so that both you and any reviewing court, if there is one, can have a picture, since, as you inform me, you can't very well make the trip to Palm Springs.

The Court: This one may be admitted in evidence.

Mr. Brett: I will go rapidly through the others in view of Judge Preston's statement, but I do want something in the record so they can be identified.

Q. I show you next Respondents' Exhibit F for identification. Did you take that photograph?

A. I did. That was taken the same day as the other. It was either Monday or Tuesday. I took some Monday afternoon and some Tuesday morning.

Q. Where was it taken?

A. This was taken near the southeast corner of Parcel 14, looking north along the east boundary.

Q. Of what?

A. Parcel 50, and farther along Parcels 46 and 47 to the north.

Q. Those are the parcels which are illustrated

(Testimony of Bernard G. Evans.)

on the respondents' exhibit which has been received in evidence as [79] Exhibit A?

A. That is correct, yes.

Mr. Brett: I will offer F in evidence.

The Court: It may be admitted.

The Clerk: Exhibit F in evidence.

(The photograph heretofore marked Respondents' Exhibit F for identification was received in evidence.)

Q. (By Mr. Brett): Now I will show you Exhibit G, a photograph, that is an exhibit for identification. Did you take that photograph?

A. I took that. Either I, or I was present when it was taken.

Q. When was that taken?

A. That was taken in 1948, just prior to this former hearing on this case. It was taken from the easterly portion of Parcel 41, which is the five-acre parcel, looking in a northwesterly direction, and showing the cottages along the north line of that parcel.

Q. So that we can orient it with other exhibits, I refer you to the drawing which has been received in evidence as Respondents' Exhibit B, and I will ask you if the parcel this refers to as 41 is the small parcel colored in red and having the designation in a capital letter "E" as it appears on Exhibit B?

A. Yes, that is correct. [80]

Q. Is that a fair portrayal of the conditions as they existed as of that date? A. Yes.

(Testimony of Bernard G. Evans.)

Q. Did you return to the property in your recent investigation?

A. I returned to the property last week and three weeks ago.

Q. Is it a fair portrayal of the conditions existing as of that time?

A. Yes, with this alteration, that there has been quite a little dirt removed from this parcel and placed on land on the west side of Indian Avenue. There has been some grading in there, but arrangements—I do not know what arrangements were made, but dirt was removed. It is more level today than it was.

Mr. Brett: I will offer Respondents' Exhibit G in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit G in evidence.

(The photograph referred to was marked Respondents' Exhibit G and received in evidence.)

Mr. Brett: With your Honor's permission, I want to go back to this F for just one minute.

Q. I failed to ask you, Mr. Evans, if that was a fair portrayal of the conditions existing in November of this year [81] and October, 1948, as shown in Exhibit F?

A. Yes, with the exception some of the brush is gone.

Q. I am not talking about the last picture.

A. Yes.

(Testimony of Bernard G. Evans.)

Q. Next I will show you Exhibit H for identification, a photograph. Did you take it?

A. Yes, I took that.

Q. And when? A. Last week.

Q. And where was it taken?

A. That was taken on the two-acre parcel immediately north of Lot 50.

Q. That is the one that is shown as 47 in blue on Respondents' Exhibit A?

A. That is correct, on the dirt road which runs through the property, runs through 50 and through 47.

Q. Is that a fair portrayal of the conditions as they existed at the date of the picture?

A. Yes.

Q. And also as they existed in October, 1948?

A. Yes.

Mr. Brett: I offer Respondents' Exhibit H in evidence.

The Court: Admitted.

The Clerk: Exhibit H in evidence.

(The photograph referred to was marked Respondents' Exhibit H and received in evidence.) [82]

Q. (By Mr. Brett): Next I will show you a photograph, which is Exhibit I for identification, and which is both a photograph of a person and of an area. Was that picture taken at a time when you were present?

A. The photograph is of me, taken by Mr.

(Testimony of Bernard G. Evans.)

Jones. It is close to the southwest corner of Parcel 50.

Q. Mr. Jones is Mr. Donald C. Jones?

A. Yes.

Q. When was that taken?

A. That was taken in 1948.

Q. Parcel 50 is which area?

A. That is the five-acre parcel.

Q. Parcel 50?

A. I beg your pardon. I am wrong. This is the two-acre parcel.

Mr. Preston: 50 is the two-acre parcel?

The Witness: Yes.

Q. (By Mr. Brett): Is this a fair portrayal of the conditions as they existed on that date?

A. Yes.

Mr. Preston: I will stipulate these are all fair portrayals of whatever you say they are, and you can put them in.

Mr. Brett: On both dates?

Mr. Preston: Any day.

Mr. Brett: I will accept the stipulation. [83]

The Court: Very well.

Q. (By Mr. Brett): That is true, isn't it, Mr. Evans? A. Yes.

Mr. Brett: We will offer Exhibit I in evidence.

Mr. Preston: Just state what they are, that's all that is necessary.

The Court: Admitted.

The Clerk: Respondents' Exhibit I in evidence.

(Testimony of Bernard G. Evans.)

(The photograph referred to was marked Respondents' Exhibit I and received in evidence.)

Mr. Brett: I can't say what they are. I will have to ask the witness to do that.

Mr. Preston: All right.

Q. (By Mr. Brett): I will show you Respondents' Exhibit J for identification. Did you take that photograph?

A. Yes, that is a picture I took.

Q. Who is the person in the picture?

A. Mr. Jones is in the middle distance.

Q. When did you take that?

A. That was taken in 1948?

Q. And where?

A. It is looking north from the approximate south line of the five-acre parcel marked "Parcel E" in Exhibit B.

Q. The five-acre parcel, which has some frontage on Palm Canyon Drive? [84]

A. Yes.

Mr. Brett: We will offer Respondents' Exhibit J in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit J in evidence.

(The photograph referred to was marked Respondents' Exhibit J and received in evidence.)

Q. (By Mr. Brett): Next I will show you a photograph marked Respondents' Exhibit K for identification. Were you present when that picture was taken?

A. Yes.

(Testimony of Bernard G. Evans.)

Q. Your picture is in it? A. Yes.

Q. And who took the picture?

A. Mr. Jones took the picture.

Q. When was it taken?

A. Taken in 1948?

Q. And where?

A. Taken from South Palm Canyon Drive, looking northeasterly across and over into the 40-acre parcel. It is taken some distance away. This is showing the general terrain, which characterizes the 40-acre parcel and the 5-acre parcel at the time.

Q. Those are in Section 26? A. Yes. [85]

Q. And are portrayed in red and indicated by the capital letter "E" on Exhibit B?

A. Yes.

Mr. Brett: I offer K in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit K in evidence.

(The photograph referred to was marked Respondents' Exhibit K and received in evidence.)

Q. (By Mr. Brett): Next I will show you Respondents' Exhibit L for identification.

A. That is a photograph taken by me in 1948, looking easterly in Section 26, showing a dirt road about the middle of the west half of the section, and looking out across the center line of the section to the east and slightly to the north, showing the general character of the land in the 40-acre parcel.

Q. That has Mr. Jones' picture in it?

(Testimony of Bernard G. Evans.)

A. Yes.

Mr. Brett: I offer Respondents' Exhibit L in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit L in evidence.

(The photograph referred to was marked Respondents' Exhibit L and received in evidence.)

Q. (By Mr. Brett): I will next show you Respondents' Exhibit M for identification and ask you what that is? [86]

A. M is a scene in the central street, that is, the street which runs through Parcels 50 and 47 and 46, and it is actually a scene in Parcel 46, to the best of my recollection.

Q. That is to illustrate the environment immediately surrounding 50?

A. It shows the character of the improvements, yes.

Mr. Brett: I offer Respondents' Exhibit M in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit M in evidence.

(The photograph referred to was marked Respondents' Exhibit M and received in evidence.)

Mr. Brett: This will be the last I will offer before noon, your Honor. I have other evidence for the afternoon.

(Testimony of Bernard G. Evans.)

Q. I now show you Exhibit N for identification and ask you the same question.

A. This is taken on the existing dirt road which marks the east boundary of Parcel 50, and was taken from about the north line of 50, looking along the east line of Parcel 47.

Mr. Brett: We offer Respondents' Exhibit N in evidence.

The Court: Admitted.

The Clerk: Respondents' Exhibit N in evidence.

(The photograph referred to was marked Respondents' Exhibit N and received in evidence.)

Mr. Brett: Now, your Honor, being 12:00 o'clock, do you desire to proceed? [87]

The Court: We will take our recess at this time.

Mr. Preston: Will we get through today?

Mr. Brett: I am not going to be too long with this witness.

The Court: We will recess until 2:00 o'clock. I know how long it takes you.

(Whereupon, at 12:00 o'clock noon, Tuesday, November 28, 1950, a recess was taken until 2:00 o'clock p.m. of the same day.) [88]

November 28, 1950—2:00 P.M.

The Court: Proceed.

The Clerk: I have marked five more photographs for identification as Respondents' Exhibits O, P, Q, R, and S.

(The photographs referred to were marked Respondents' Exhibits O, P, Q, R, and S, respectively, for identification.)

Mr. Preston: Do they show what they are on the back of them?

Mr. Brett: I will have the witness testify to that.

Mr. Preston: We will admit them.

Mr. Brett: I want the testimony.

BERNARD G. EVANS

called as a witness by and on behalf of the respondents, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Brett:

Q. Now, Mr. Evans, in reconsidering this matter, have you arrived at an opinion as to the fair market value of the fee of the two-acre tract as of the present date? A. Yes.

Mr. Preston: To which we object upon the ground that the date is 1948, and this witness is already on the record with his opinion as of that date. [89]

(Testimony of Bernard G. Evans.)

The Court: Well, he can ask him also now, can't he?

Mr. Preston: Do you want to hear it as of this date, also?

The Court: Yes. He can do it.

Q. (By Mr. Brett): What is that opinion, Mr. Evans? A. \$12,500.00.

The Court: An acre?

The Witness: For the parcel.

The Court: For the two acres.

Q. (By Mr. Brett): How much for the two acres? A. That is the two acres.

Q. How much per acre, then?

A. As of that, \$6,250.00.

Q. Just what factors did you consider in arriving at that opinion?

A. The present situation of the property as it exists today; the circumstances governing the area as a whole; the type and character of near-by development and adjacent development; the amount of property which is available within the City of Palm Springs and which has been available for some time; the development of the city; the history of the community; all of the factors which, in my opinion, go to make up or affect the value of real estate. There is the zoning——

Q. Just a moment. There are some parts of your answer I did not get. I would like to have the reporter read it. [90]

(The answer was read by the reporter.)

(Testimony of Bernard G. Evans.)

Q. (By Mr. Brett): Now, among other things, did you consider transactions which you deemed to be comparable or partially comparable?

A. Yes, sir.

Q. Are there any to which you particularly referred in reference to the two-acre tract?

A. In addition to those, I think, which we went into two years ago, there was a sale earlier this year of a 10-acre parcel which is one-quarter of a mile south and approximately one-quarter of a mile east of this parcel on the south side of Ramon Road.

Q. I show you Respondents' Exhibit D. Does that cover an area so you can show where it is located?

A. Yes.

Q. Do you have a colored pencil?

A. Yes.

Q. Will you place on the map, which is Exhibit D, the location of the property which you have just referred to?

A. (Witness complying): It is on the south side of Ramon Road, just east of the center line of the section, with a frontage of 330 feet on Ramon Road, running through the one-quarter mile, with an equivalent frontage of 330 feet on the north side of Sunny Dunes Road.

Mr. Preston: May I make an inquiry? I don't understand [91] what this is. What is it you are claiming of this?

Mr. Brett: This is a transaction which he considered in part comparable to this acreage in fixing value.

(Testimony of Bernard G. Evans.)

Q. Is that correct, Mr. Evans? A. Yes.

Mr. Preston: If your Honor please, I haven't objected thus far, but I don't think an expert on values can be cross-examined like this, except on cross-examination of counsel, can he?

The Court: I can't follow you on that. He is an expert and he is subject to cross-examination upon any matter, circumstance or fact that has any relevancy to his opinion.

Mr. Preston: I am talking about his direct examination. May he, on his direct examination, go into specific sales?

The Court: Yes.

Mr. Preston: If that is the ruling, it is all right with me, but that was not the rule when I was younger.

The Court: It is the rule ever since I have been on the bench in these condemnation cases.

Q. (By Mr. Brett): Mr. Evans, was that an actual sale? A. That was an actual sale.

Q. From whom did you obtain the information about the sale?

A. I obtained the information on that sale from Mr. Sheptenko, who is the broker who made the sale. I first [92] obtained it from a third party, John Williams, a broker. Then I ran down the information and confirmed it from Mr. Sheptenko, who was the broker who made the sale.

Q. The actual broker? A. Yes.

Q. Did you go to the site and examine the property? A. I did.

(Testimony of Bernard G. Evans.)

Q. Did you learn to whom the sale had been made and the price? A. Yes.

Q. And the amount of acreage? A. Yes.

Q. When was the sale made?

Mr. Preston: To which we object on the ground it is hearsay and this witness couldn't testify to anything but hearsay.

The Court: As to when the sale was made, unless he knows directly, you are correct. That would be hearsay unless he knows.

Q. (By Mr. Brett): What was the price at which the sale was made?

Mr. Preston: To which we make the objection it is hearsay, unless he knows. [93]

The Court: Sustained.

Mr. Brett: I am not arguing with your ruling, but I am merely getting information. Is it your Honor's ruling I would have to produce here a buyer or seller? Knowledge couldn't come otherwise.

The Court: I am not telling you what you should do. I am just saying that is hearsay unless he has actual knowledge that the sale occurred for so much.

Mr. Brett: I recognize that, but I am trying to find in my mind what actual knowledge would be.

Q. You yourself interviewed one of the participating parties, the broker that made the sale or the transaction, is that right? A. Yes.

Q. And you learned from that broker the name of the purchaser, did you? A. Yes.

(Testimony of Bernard G. Evans.)

Q. The amount that was paid? A. Yes.

Q. The amount of property involved in acreage?

A. Yes.

Q. And the price paid? A. Yes.

Mr. Preston: I object to all those questions on the ground that they only emphasize the fact that it is just [94] hearsay.

The Court: Overruled. Maybe he is leading up to it. I don't know.

Q. (By Mr. Brett): Mr. Evans, as a result of the information thus gained and in the manner just stated, will you state the date of the sale?

Mr. Preston: To which we object on the ground it is hearsay evidence as to when the sale took place.

The Court: It would be hearsay. Sustained as to the date of the sale. I understand the rule to be, when one goes on the stand and testifies to value of real estate, he can do so if he actually knows that the transaction took place, himself, and what it brought, not what people in the community say, because everyone could say that the sale was made and say what it brought. The rule is confined to actual knowledge of sales in the community of similar property during a similar period, and the amount. That is the fundamental rule.

Mr. Brett: I am not either arguing with your Honor or disputing the rule, but I think you have drawn it too close. This is direct knowledge. Otherwise, the owner himself would have to come in.

(Testimony of Bernard G. Evans.)

The Court: No, I don't say that. Can't you bring in those who told him that?

Mr. Brett: The broker?

The Court: The man that carried on the transaction. [95] When you get right down to it, the man who consummated the transaction is the one who testifies directly to the point. I think that is the rule, gentlemen.

Mr. Brett: On that basis, I can't bring out the additional facts.

Q. That information which you obtained in the manner you describe is a part of the information you used in fixing the value of the two-acre parcel, is that correct? A. That is correct.

Q. You referred to the present situation in reference to this area. What did you have in mind there, so that the court can understand what you considered?

A. Physically, the physical terrain, the type and character of development. In other words, what is there on the ground.

Q. Tell us what you mean by that, so that the court can in his mind understand what you considered.

A. That part of Section 14 is what I would characterize as a fourth or fifth rate residential area. It is almost a slum area. It has grown up like the proverbial Topsy, with shacks and little houses and rather a typical low, extremely low quality residential district, such as to be found on the fringes or in the slum areas of any community.

(Testimony of Bernard G. Evans.)

Until recent months there has been no effort, in my opinion, made to control the development at all. There are [96] no paved streets. The streets aren't even where they are supposed to be. That is, there is a layout of that, a layout which had been made by the Indian Office, but in many cases the houses are in the middle of the street. The houses that are supposed to be on certain allotments are not. They are either sitting on the line or sitting out in the middle of the street. There is no sewerage in the area.

Q. No sewerage in the area at all?

A. No, not inside Section 14. There is a sewer on Indian Avenue. It is now, and as of this date, within the city limits of Palm Springs and subject to the building and zoning ordinances and general control ordinances of the City of Palm Springs. There are no dedicated streets within the section. By "dedicated," I mean dedicated for public use and accepted by any governmental body for maintenance.

Mr. Brett: I am going to interrupt just a minute, if I may. I understand Judge Preston has no objection to these two offers. I want to offer in evidence a copy of an act of Congress, Public Law 322, 81st Congress, Chapter 604, First Session. The court, of course, can take judicial notice, but in order that you have the facts, I want to make the offer here.

The Court: There is no objection?

Mr. Brett: It is an act which directly refers

(Testimony of Bernard G. Evans.)

to and describes the Palm Springs Reservation and, among other things, [97] makes the reservation amenable to the laws, both health and zoning, of the City of Palm Springs.

Mr. Preston: And also provides for the widening of Indian Avenue.

Mr. Brett: It authorizes it.

Mr. Preston: It authorizes the widening of Indian Avenue.

The Court: It may be admitted.

The Clerk: Respondents' Exhibit T in evidence.

(The document referred to was marked Respondents' Exhibit T and received in evidence.)

Mr. Brett: Then I also desire to offer at this time a certified copy, certified by the City Clerk of the City of Palm Springs, which is a city organized under the laws of the State of California, of the zoning ordinances, and the map illustrating the land uses which can be made in the City of Palm Springs, including the Indian lands in the Indian reservation, as Exhibit U.

The Court: It may be admitted.

The Clerk: Respondents' Exhibit U in evidence.

(The document referred to was marked Respondents' Exhibit U and received in evidence.)

Q. (By Mr. Brett): Mr. Evans, you are familiar with that zoning ordinance that I just referred to? A. Yes.

(Testimony of Bernard G. Evans.)

Q. You have considered that in fixing your valuation? [98] A. Yes.

Q. And what zoning regulations affected this parcel or this two-acre piece?

A. This is in Zone R-1-A.

Q. What are the limitations of Zone R-1-A?

A. That is a single-residence zone which provides a minimum ground area of 7500 square feet per dwelling.

Mr. Preston: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Brett): Do the present structures which are now existing and have been in place upon the two-acre parcel conform to that ordinance?

Mr. Preston: To which we object on the ground it is immaterial. We admit they are not.

Mr. Brett: I will stipulate with you they do not.

Mr. Preston: And we are not talking about that at all.

Mr. Brett: I understand the court will accept the stipulation?

The Court: Yes.

Q. (By Mr. Brett): Mr. Evans, did you consider, among other things, what would be the effect of such a thing as a fire or some other destruction of the present existing structures upon the use of the property?

Mr. Preston: To which we object as incompetent, irrelevant, and immaterial. It presupposes

(Testimony of Bernard G. Evans.)

this property is [99] going to remain shacks all the rest of their lives, when the property is just now being allotted, and what will become of it is mere speculation from this witness' standpoint. I don't see how it could affect the value at this time if they might have a fire and burn out the shacks. Maybe it would be the best thing that ever happened to the town, if they did.

Mr. Brett: Your Honor, I will indicate for the record what I am offering it for, but my question was merely whether he considered it. But I do want to show the witness considered the fact that, while the non-conforming use is lawful now, under the zoning law, if there should be any destruction, whoever would use the property would have to conform to the zoning ordinance and could no longer put it to the present use, which provides a multiple income as distinguished from a single residence. I think that is proper to show.

The Court: The objection is overruled. You may go ahead.

Q. (By Mr. Brett): Do you have the question in mind?

A. Yes. I have given consideration to those possibilities.

Q. What consideration did you give to that fact?

A. This, that should existing improvements in considerable areas of Section 14 be destroyed by fire, under the present ordinance they could not be replaced as such.

Mr. Preston: Do you refer to the provisions

(Testimony of Bernard G. Evans.)

of the ordinance just introduced in evidence? [100]

The Witness: Yes.

Q. (By Mr. Brett): What does it say about rebuilding?

A. New construction, I am speaking of, within Palm Springs.

Q. What kind of restrictions would there be on new construction?

A. They would have to comply to the present Palm Springs residential building code, which is very similar to the uniform Building Code of the State of California.

Q. In other words, there would have to be a single residence on each—how many feet?

A. 7500 square feet.

Q. 7500 square feet.

A. That is one provision, and the other is just the usual building code types of construction.

Mr. Preston: It would be in the interest of the petitioner to go down with a match and start a fire. [101]

Q. (By Mr. Brett): Did you give consideration to the use which was being made of the properties which were immediately surrounding the two acres? A. Yes.

Q. What consideration did you give to that as to its effect on the value of these two acres?

A. That environment always inevitably casts its reflection on any property that is under consideration, and inevitably has an effect on value, probably.

(Testimony of Bernard G. Evans.)

Q. Did you consider it would have any effect upon the development of the two acres that it was surrounded by this——

A. To this extent, that the possible development of the two-acre parcel is of necessity tied in with the possible development of surrounding contiguous nearby land. Two acres standing alone is isolated and could not be developed to advantage, to a higher and better use, unless adjacent and contiguous and surrounding properties were so improved.

Q. Did you assume that the purchaser of this two acres would have any right to control, change, or modify the use of surrounding lands immediately adjacent to it?

A. No, I don't believe I did.

Mr. Preston: What was the answer?

The Witness: I don't believe I did.

Q. (By Mr. Brett): Did you form an opinion as to the [102] present day, that is, today's fair market value of the five-acre parcel?

A. I have.

Q. As in fee? A. I have.

Q. What is that opinion? A. \$32,500.

Q. And that is how much an acre, Mr. Evans?

A. Mathematically, that is \$6,500 an acre.

Q. Mr. Evans, did you consider that there were any transactions in the area which you deemed to be comparable to that five-acre piece?

A. None exactly comparable. I took into consideration the sale of this 10 acres, to which I have

(Testimony of Bernard G. Evans.)

previously made reference, on the south side of Ramon Road. Also the sale of individual lots on Sunny Dunes Road made during this year, part of the Trousdale development of several hundred acres, a half mile north.

Q. What was the nature and character of that property, as you saw it? A. The five acres?

Q. Yes.

A. At the extreme north line, there are four or five small frame cottages and cabins. The greater part of the five acres is and has been undeveloped land. It is land with [103] typical desert type of brush, except a part of it has been cleared, as I stated this morning, or there appears to be some dirt removed and carried across to the other side of the highway. It has a frontage 330 feet on Ramon Road and a depth of 660 feet.

Mr. Preston: Is this the five acres?

The Witness: Yes.

Mr. Preston: That isn't on Ramon Road, is it?

The Witness: I beg your pardon. On South Palm Canyon Road.

Mr. Preston: Palm Canyon Drive.

The Witness: Palm Canyon Drive. I stand corrected. It has domestic utilities, gas, water, and electricity. It also has water running through it, an Indian line, part of the old so-called irrigation land, of which little use is now being made of that water, inasmuch as adequate water is now available from the city system, and it is bounded on the south and on the east by undeveloped desert land.

(Testimony of Bernard G. Evans.)

Across the street, on the west side of Palm Canyon Drive, there is quite a little residential development. It is bounded on the north by a five-acre parcel, which I think is held under trust patent by Mr. Lee Arenas, which is developed as a cottage court, trailer camp.

Q. (By Mr. Brett): Did you form an opinion as to the fair market value in fee today of the 40-acre parcel? [104] A. I have.

Q. And what is that value? A. \$50,000.

Q. How much an acre?

A. That is \$1,250 an acre.

Q. Will you describe that property?

A. That property is located one-quarter mile south of the state highway which runs from Palm Springs to Indio, and one-quarter mile west of the east line of the section, and the nearest privately-owned land.

There is at the present time no roadway other than perhaps a desert trail leading into it. It is sloping, typical brush-covered desert land, characteristic of the area. It has a gentle slope to the north.

It is located on the broad alluvial fin coming out of San Andreas Canyon, Palm Canyon, and Murray Canyon, the alluvial fin below those canyons.

It is one-quarter mile to the nearest improved streets and to the nearest utilities.

It is zoned under the existing zoning ordinance for guest ranch use which, I believe, is called Zone E-2.

(Testimony of Bernard G. Evans.)

The development in the area is—I would say the adjoining section on the east is 10 to 12 per cent built up. It is in the nature of a residential subdivision operating, on, in a way as a ranch. That is, it is called—oh, Smoke [105] Tree Ranch, a restricted residential subdivision.

The area on the north side of the state highway has some rather substantial improvements on it, the Biltmore Hotel, the Deep Well Guest Ranch, and quite a little residential development, including 72 houses which were built in Tahquitz River Estates about two and a half years ago, and Paul W. Trousdale of Los Angeles has a part of a development which he undertook at that time.

Q. These properties you describe, such as the Biltmore Hotel, they have frontage on the highway, don't they? A. Yes.

Q. The Deep Well Ranch has frontage on the highway? A. That is true.

Q. The Smoke Tree Ranch has frontage on the highway?

A. The Smoke Tree property has, yes.

Q. The property which is the 40-acres allotted to Eleuteria Brown Arenas has no frontage on the highway and no part of it is closer than about a quarter-mile to the highway, is that not correct?

A. That is correct.

Q. Were there any properties which you investigated which you deemed to be comparable to that property? [106]

A. The nearest comparable, I think, in recent

(Testimony of Bernard G. Evans.)

times, is the fairly recent sale of a 10-acre parcel on the northwest corner of Ramon Road and El Cielo Road.

Q. Is that the same 10 acres?

A. No. This is 10 acres Bob Hope bought last March. It is comparable in the sense it is typical desert land. It is about the same distance from the downtown area. It is east instead of south and, of course, it is smaller in size. It is 10 acres, whereas we are talking about 40 acres here.

Q. As I understand it, Mr. Evans, you investigated in reference to the price paid, the date of the sale, by inquiring of the broker who conducted the sale, is that right?

A. Yes. I found the sales were rather widely known, but I talked to the man who actually made the sale.

Q. But you yourself did not act as the broker?

A. No, I did not.

Q. You can, however, if cross-examined, inform the court and counsel who interrogate you, as to what you learned of the terms and the prices?

A. Yes.

Q. And you considered that information in arriving at your opinion as to the value?

A. Yes.

Q. And that is the most recent and most comparable transaction in the Palm Springs area, in your opinion? [107]

Mr. Preston: Objected to as already answered

(Testimony of Bernard G. Evans.)

and argumentative, cross-examining his own witness, and everything that is wrong.

The Court: He may answer. The objection is overruled.

The Witness: Yes. It is the only recent sale of acreage, that is, a piece of 10 acres or more, anywhere near this property.

Q. (By Mr. Brett): Now, Mr. Evans, assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties, who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative; that [108] she is entitled to receive the income derived from such leases unless the Secretary of the

(Testimony of Bernard G. Evans.)

Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period expires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell and may not encumber her interest under such trust patent to any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion would be the fair market value [109] of such interest in said 2-acre tract?

Mr. Preston: I wish to renew the previous objection, and to add that that question doesn't prop-

(Testimony of Bernard G. Evans.)

erly characterize the estate of the Indian in the allotment and, moreover, does not deal with the value of the use and occupation of the property and the improvement by the Indian herself.

The Court: I will make the same ruling I made as to the other questions. The court reserves the final ruling on it. You may answer.

The Witness: I think the two-acre parcel under those conditions would be worth 50 per cent of its fee value, or the sum of \$6,250.

Mr. Preston: Is that for all three of them?

Mr. Brett: No. That is the two acres.

Q. Now, what, in your opinion, would be the fair market value of such interest in the five-acre tract?

Mr. Preston: To which we make the same objection.

The Court: Same ruling.

The Witness: The sum of \$16,250, or 50 per cent of the value in fee.

Q. (By Mr. Brett): What, in your opinion, would be the fair market value of such interest in the 40-acre tract?

A. \$12,500, or 25 per cent of the fee.

Q. Now, Mr. Evans, it is correct, is it not, that the values which you have given today are different, as far [110] as the interest of the Indian, than the values which you gave in October, 1948?

A. They are.

Q. Will you explain to the court the reason for that difference?

(Testimony of Bernard G. Evans.)

A. I have approximately 20 per cent lower value on the acreage today than I had two years ago. I found that as a result of my investigation of market conditions, that is a prevalent condition throughout the Palm Springs area. That they have had two very poor years, years of depressed occupancy and depressed building activity, and complete absence of subdivision development, during the last two or three years.

With respect to the two-acre parcel, I don't consider it is worth any less. That is fundamentally developed in the same manner and yields much the same return to the owner.

I believe that the value of the trust patent is substantially greater in the instance of the first two properties than I stated in 1948. At that time I understood and was informed that these leases and permits were subject to 30-day cancellation clause. I now understand and believe they can be made for five years.

Q. That is since the trust patent has been issued?

A. That's right. Therefore, I think that the value of the trust patents on the two-acre parcel and the five-acre [111] parcel is substantially higher than the figure I stated two years ago.

As to the acreage, the 40 acres, I see no difference in it, because I can't in my own mind conceive of any use which could be made of that 40 acres with the present conditions imposed upon it. Its best usefulness is for subdivision, and it couldn't con-

(Testimony of Bernard G. Evans.)

ceivably be subdivided or developed under the trust patent.

Q. Now, Mr. Evans, at my request did you in your last examination of properties in and around Palm Springs examine and also photograph some of the properties which Mr. Beckley had referred to as those being considered by him?

A. Yes.

Q. I will show you Respondent's Exhibit O for identification and ask you if that is a photograph that you took?

A. Yes.

Q. When did you take that?

A. I took that last week, on Monday or Tuesday.

Q. What property is that a photograph of?

A. That is a two-story hotel property, one- and two-story hotel, at the southeast corner of Indian Avenue and Ramon Road. I believe it is called the Miramonte Hotel.

Q. The Miramonte Hotel? [112]

A. Yes.

Q. After you had inspected the property, did you form an opinion as to whether or not that property had any comparability to the two-acre parcel in Section 14?

A. I did.

Q. And what is that opinion?

A. I don't think there is the remotest comparability between the two.

Q. What is your reason for that opinion?

A. Location. This is a location on a main highway, one of the main roads of Palm Springs, and the main east and west road. That is, Ramon Road

(Testimony of Bernard G. Evans.)

runs east some 10 or 12 miles to the intersection of the state highway at One Thousand Palms, I believe it is called, a paved road all the way. This is in a hotel zone. I can't see that it compares in any way with the two-acre parcel.

Mr. Brett: I will offer Exhibit O in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibit O in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit O.)

Q. (By Mr. Brett): I will next show you Exhibit P for identification and ask you if you took that photograph? A. Yes, I did.

Q. The same day? [113]

A. The same day.

Q. And what is that a photograph of?

A. That is a two-story hotel, the Voranda, I believe.

Q. That is V-o-r-a-n-d-a?

A. Yes. That is on the east side of Indian Avenue a few hundred feet south of Ramon Road.

Q. After examining that property, did you come to any conclusion and opinion as to whether it had any comparability? A. I did.

Q. To the two-acre parcel? A. I did.

Q. And what is that opinion?

A. In my opinion, it has no comparability at all for the same reasons that I have just stated as applicable to the Miramonte.

Mr. Brett: I offer Exhibit P in evidence.

(Testimony of Bernard G. Evans.)

The Court: Admitted.

The Clerk: Respondent's Exhibit P in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit P.)

Q. (By Mr. Brett): I will show you Respondent's Exhibit Q for identification. Is that a photograph that you took? A. Yes. [114]

Q. On the same day? A. Yes.

Q. Is the location of that property within the area shown on Respondent's Exhibit A?

A. Yes.

Q. Could you indicate its location upon that exhibit?

A. I will mark it with a red cross. I may be one block off. I mislaid my notes. It is on the corner of Calle Encilia and Ramon Road.

Q. That is one of these duplex properties?

A. That is a single private residence, that particular house, although duplexes are on the street just south of it.

Q. I will also show you Exhibit R for identification and ask you if that is the photograph taken the same day of some of the duplexes you referred to.

A. Yes. Those are on Calle Santa Rosa or the next street east. I am not certain as to which one of those it is. It is either the third or fourth street east of Indian Avenue running south from Ramon Road.

(Testimony of Bernard G. Evans.)

Q. Are those fair representations of the improvements which are on those various calles?

A. Yes. They are characteristic of the improvements in that tract.

Q. Which are illustrated on Respondent's Exhibit A [115] as Calle Ajo, and so forth?

A. Yes.

Q. And run south from Ramon Road in a north and south direction? A. Yes.

Mr. Brett: I will offer Respondent's Exhibits Q and R in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibits Q and R in evidence.

(The photographs referred to were received in evidence and marked Respondent's Exhibits Q and R.)

Q. (By Mr. Brett): You have stated you considered some property on Sunny Dunes Road. I will show you a photograph marked S for identification.

A. Yes, I took that picture. That is on Sunny Dunes Road showing some recently built houses along the south side at a point approximately 2,000 feet east of Palm Canyon Drive. I am very familiar with that tract, because I was one of the original appraisers of the property under the program by which it was improved.

Q. And this is a fair illustration of the type of development of that tract?

(Testimony of Bernard G. Evans.)

A. Yes. The development is better on the other streets. This is the lower class of buildings. These are about in the \$8,000 to \$12,000 price class. [116]

Mr. Brett: I will offer this in evidence.

The Court: Admitted.

The Clerk: Respondent's Exhibit S in evidence.

(The photograph referred to was received in evidence and marked Respondent's Exhibit S.)

Mr. Brett: You may take the witness.

Cross-Examination

By Mr. Preston:

Q. Mr. Evans, what is the highest use that you have assumed would be made of the two-acre tract in Section 14?

A. That is a very difficult question to answer. The highest use that I can conceive being made of that property, in order to produce an income so long as the greater part of the section remains in the condition it is, is very much the way it is improved today. That is to say, quite often, in my opinion, inferior improvements or slum improvements, will produce more revenue.

Q. You have assumed, have you not——

A. May I finish my answer?

Q. Yes.

A. They will produce more revenue than if they were cleaned off and new houses built on there.

(Testimony of Bernard G. Evans.)

Q. You have made a long talk, but you haven't answered my question. My question is, what is the highest use you assumed would be made within a reasonable time of this [117] two-acre tract of land?

A. I don't believe within the next five years they will be used for any purpose different than they are being used for now.

Q. Is the purpose for which it is used now the highest purpose you have considered in making up your mind?

Answer that yes or no.

A. No, I wouldn't say it was.

Q. What is the highest use you have considered?

A. The only higher use I have considered, Judge, is a use which would envision the re-development of the entire area.

Q. Have you considered what the re-development of the entire area would consist of?

A. It would consist of a great many things.

Q. What kind of property, business property or residential property?

A. No, I don't think so. I think it would be very largely residential.

Q. Have you assumed, then, that the area would never be utilized for building purposes? I am talking about Section 14 fronting on nearby Indian Avenue.

A. I thought you were talking about the two acres.

Q. I am talking about all that area there.

(Testimony of Bernard G. Evans.)

Mr. Brett: Just a minute. I will object to that as [118] not only an improper question, but incompetent and irrelevant. Here is a 640-acre piece of land, the exterior areas of which border, at least, along Indian Avenue and Ramon, business thoroughfares.

Mr. Preston: I will reframe the question.

The Court: All right, reframe the question.

Q. (By Mr. Preston): Assuming all of Section 14 that borders upon Indian Avenue and for the distance of, say, 1,056 feet east, what, in your opinion, will be the use of that property, highest use of that property or any part of it during the next five years?

Mr. Brett: Object to that, if the court please, on the same ground. I will stipulate the highest and best use of that part of it which fronts on Indian Avenue and which is zoned for business, would be business. If the question leaves out "or any part of it," you may have the witness to state his opinion as to what would be the use of that to her. I don't think I would have any objection.

Mr. Preston: No.

Mr. Brett: But when he says "any part of it," I submit both by reason of the zoning and by reason of the actual situation, the highest and best use of this area along the main thoroughfare would be for business.

Mr. Preston: I want to know from this witness what use he considers will be the highest use of this area. [119]

(Testimony of Bernard G. Evans.)

The Witness: Several uses. The area along Indian Avenue will be for business use, as it is today. There are several areas just off Indian Avenue that are used for trailer parking. I think they will be continued. I don't think there will be any new construction in the area except along the business area and in the perimeter of it.

Q. (By Mr. Preston): Do you think the zoning ordinance will remain permanent?

A. No. They always change.

Q. Did I understand you to say that under the zoning ordinance if a fire should occur, better improvements would be built?

A. I didn't say zoning. I said the building code.

Q. Well, is there any reason in your opinion why it wouldn't be proper to allow business to be established in all of the west half of Section 14?

Mr. Brett: Just a minute. If the court please, I object to that as irrelevant and incompetent. The basis of the incompetency is this: These questions are predicated, not on the value as the situation exists, but as it might later exist, and that is not a proper question.

The Court: I agree with you on that.

Mr. Preston: What is the ruling?

The Court: I sustain the objection.

Mr. Preston: Upon what theory? [120]

The Court: It is the present value.

Mr. Preston: I know it is the present value.

Q. But in estimating the present value, haven't you considered that the zoning ordinance might be amended?

A. Oh, yes.

(Testimony of Bernard G. Evans.)

Q. Have you considered that the restrictions might be? A. What restrictions?

Q. The government restrictions, we will call them. A. On the trust patent?

Q. Yes, the trust patent.

A. I have put two values on it. I put one on the fee value and one on the trust patent.

Q. Have you considered the fact that the government, as trustee, might consent to the issuance of a fee patent? A. Oh, yes.

Q. You have considered that, have you?

A. Yes.

Q. Have you considered that the government might consent to a sale of the property and restrict the proceeds?

A. I considered that is a possibility.

Q. Have you considered the fact that the Indian might improve his own property? A. Yes.

Q. And erect business houses on it, if need be?

Mr. Brett: On which property? [121]

Mr. Preston: On any of it.

The Witness: I can't conceive of any business houses on any of the property in question.

Q. (By Mr. Preston): How is that?

A. I can't conceive of any business houses on any of the property. I can't conceive of the erection of any business building on any of the property under discussion.

Q. Is there any difference in your opinion between the value of the property to the Indian and

(Testimony of Bernard G. Evans.)

the market value of the property under these trust patents?

A. That is a legal question I wouldn't be prepared to answer.

Q. You couldn't answer that?

A. My opinion is the market value.

Q. You have not, have you, expressed an opinion here intentionally, at least, as to what the value to the Indian is of his allotment, have you?

A. No. The value to an individual is governed by so many, many things. It might be worth more to one Indian than to another. I wouldn't attempt to put a value on it to the individual.

Q. Then you wouldn't say what you have said about market value had any bearing upon the value of the property to the Indian allottee?

A. To the individual Indian? [122]

Q. Yes.

A. I couldn't look in his mind, Judge.

Q. You have assumed, have you, that some third person, the purchaser, would take this land from an allottee, but the government would still be the trustee of the land?

A. As to the value of the trust patent, yes.

Q. The government would still be the trustee and still regulate the use of the land in the hands of the purchaser, is that it?

A. Yes. I think that was the question that was put to me.

Q. And that is the question you have answered, isn't it?

(Testimony of Bernard G. Evans.)

A. As to the value of the trust patent.

Q. As to the value of the trust patent on the market. That is what you mean?

A. Under the theoretical market.

Q. Under the theoretical market, but it is the market value in your opinion, isn't it?

A. Yes.

Q. And it has nothing to do with what the Indian could do with his own property?

A. I have to say, Judge, again I can't tell you what any individual Indian thinks his property is worth. That is in his mind. [123]

Q. You haven't really considered what the Indian's own capabilities are with reference to his allotment, have you?

A. I consider what he can do with the property, but not what he thinks it is worth.

Q. How is that?

A. I have considered what the individual Indian could do with the uses he could make of his property, but I could not tell you what the individual Indian thinks it is worth to them.

Q. But when you put figures on this property, you put figures on a theoretical purchaser who would be tied down by all the restrictions in this question, is that it?

A. As to the trust patent, yes.

Q. As to the trust patent.

A. I consider he would have all the rights in the property that the Indian has now.

(Testimony of Bernard G. Evans.)

Q. But you don't know what the Indian's rights are now, do you? You are just taking what is in this question as true.

A. I know from my own knowledge and observation.

Q. What is your opinion about the nature of his title? A. His title now?

Q. The Indian allottee's, necessarily, what you know [124] about it.

A. He has a patent held in trust by the United States government.

Q. What is the difference between that and a trusteeship?

A. It is a trusteeship, except it has restrictions on it that he can't encumber it or dispose of it or hypothecate it, except subject to certain provisions.

Q. Have you assumed that the government, as trustee, would do its duty? A. Yes.

Q. Have you assumed that if it was to the best interests of the Indian to sell his land, that the government should consent to it? A. Yes.

Q. And would consent to it? A. Yes.

Q. Have you assumed that there is water on this land? A. Oh, yes. Domestic water?

Q. Yes, or irrigation water, if necessary.

A. Are we still speaking about the two acres?

Q. I mean all of it now.

A. There is no water on the 40 acres.

Q. There is water on what part of it? [125]

A. None.

(Testimony of Bernard G. Evans.)

Q. On the 5 acres? A. Yes.

Q. And accessibility to water on the 2 acres?

A. There is water on the 2 acres, city water.

Q. Have you assumed there would be ingress and egress from all these properties?

A. Yes.

Q. You have assumed all that and still you can't see any greater value when you come to put it on the market, is that it?

A. That is correct.

Mr. Brett: Greater than that.

Q. (By Mr. Preston): Greater than what you have given if it goes on the market encumbered in the way you have considered here in this question?

A. That is correct. I repeat again that was 50 per cent on the smaller parcel, 25 per cent on the larger parcel.

Q. You have changed your figures since the last testimony you gave?

A. Because of the change in the leases, yes.

Q. That is because of the change in the leasing restriction? A. Yes. [126]

Q. And that shows you are valuing this property as though the restrictions were permanent, are you not?

A. I am valuing it as they exist today, Judge.

Q. That is what I say, as though those restrictions would remain, so far as you know, indefinitely?

A. No. I don't know how long they will remain.

Q. And suppose the restrictions were lifted and

(Testimony of Bernard G. Evans.)

there weren't any restrictions at all about buildings or about the use of this property by the city of Palm Springs, would your opinion be the same as to value?

Mr. Brett: Just a moment. Object to that on the ground it is not proper cross-examination and it is incompetent and irrelevant. That again is assuming a condition which does not exist and, therefore, is not a basis of value. You can't value property on the theory if it is changed, it will have a certain value. That is the same ruling your Honor made, but if you want authority, I will give it to you.

The Court: Objection sustained.

Q. (By Mr. Preston): Suppose that a piece of property was in the hands of a competent trustee, or the legal title was in the hands of a competent trustee, honest trustee, and the equitable estate was in an individual, would you put a different value upon that estate than one in which there was no trustee? [127]

A. That would depend on the terms of the trust, Judge.

Q. The terms of the trust. What are the terms of the trust in this case where the government is the trustee that are so onerous as to depreciate the value?

A. The principal thing which depreciates the value here, in my opinion, is the fact that it becomes a frozen investment.

Q. A frozen what?

A. A frozen investment. It cannot be hypothe-

(Testimony of Bernard G. Evans.)

ated, cannot be sold, you cannot borrow any money on it, and you couldn't make a loan on it to improve the property. It is frozen.

Q. You mean without the consent of the trustee?

A. That's right, yes.

Q. Wouldn't that be true of any kind of property that was held in trust?

A. It would depend on the terms of the trust. Let me explain it this way. If I have a piece of property I am beneficiary of, and it is held by a trustee, and it provides—for instance, it is suitable for subdivision, and provides under no circumstances shall it be cut up or subdivided for the next 15 years, which the grantor might have had some reason to put in there, its market value is certainly adversely affected because of that prohibition in it. [128]

Q. Have you considered the question that it is the duty of the government to protect the Indian?

A. Oh, yes.

Q. And it has no other duty in connection with the allottee except to protect the Indian's interest in it?

A. I so understand that.

Q. If it was to the best interests of the allottee that a mortgage be made, for example, to build a house on the property, wouldn't you presume that the government would consent to it?

A. I don't think I have ever heard of anything like that, but I guess it could.

Q. But wouldn't you, in such event, presume that the government of the United States would

(Testimony of Bernard G. Evans.)

consent to anything that was to the advantage and best interests of the Indian?

A. Yes, except in some cases hypothecating it might prejudice the property to the point where he might lose it.

Q. But if arrangements were made that he would not lose it, would it be all right?

A. That is looking pretty far to the future.

Q. Isn't this reservation in a very unique location? A. Yes, it is.

Q. It is adjacent to the business district of Palm Springs, is it not?

A. Yes, the west side. [129]

Q. Do you agree it would be feasible for Palm Springs to expand over part, at least, of this Section 14? A. Would it be feasible?

Q. Yes.

A. It would be under the orderly plan of development. Otherwise, it wouldn't be.

Q. Have you considered the orderly plan of development for that area?

A. I have considered it, but I find myself running up against peculiarities.

Q. The sum and substance of this whole matter is that you have assumed this area surrounding this two-acre tract will remain as a shack area indefinitely, have you not?

A. I won't say that. I am very much afraid it will. In my opinion, it will, unless by some means it can be brought in under a re-development plan, an urban re-development plan, and completely

(Testimony of Bernard G. Evans.)

obliterated and started all over again. Otherwise, I think it is doomed to a very unhappy future.

Q. Have to rub it out and start all over again, you think?

A. For any decent development, Judge, I am afraid so.

Q. Therefore, you haven't considered that element as [130] a part of any value in your appraisal, have you?

A. I have actually given this figure a much higher value than I would as a part of a re-developed area.

Mr. Preston: Will you read that answer, please?

(Answer read by reporter.)

Q. You have given it a higher value, you say, than you would if it was a re-developed area?

A. Oh, yes. Let me put it this way, Mr. Preston. Let's keep the Indian Avenue frontage out of it. If we were to take the westerly 300 acres of Section 14 and put it all in one pot and sell it to Palm Springs interests to re-develop the entire area——

Q. It wouldn't bring as much as you have given?

A. Absolutely not. It wouldn't bring more than \$3,500 or \$4,000 an acre.

Q. Your conclusion is that the property is covered with shacks and it is more valuable that way than if it was re-developed?

A. With this property, that is undoubtedly true.

Q. It is undoubtedly true with this property?

(Testimony of Bernard G. Evans.)

A. As far as monetary value goes, Judge, I have to say it is true.

Q. Even with business?

A. I don't think there is a chance of business there in the next 100 years. [131]

Q. Suppose there was a trailer court.

A. There is 600 acres in that section. I can't presume it is going to light on that patch.

Q. You are committed to the thought that that area is about as productive as to income now as it will ever be?

A. As to this parcel right there, yes. If it were on the main east and west street, I think it is conceivable an eventual re-development of the section may extend the east and west street through the section, but I repeat the market value of the westerly acres in that section would not, in my opinion, as a result of all my investigation, be more. I think \$3,500 or \$4,000 an acre would be a big figure.

Q. Let's come down to the five-acre tract. You agree west of that area is very highly developed, don't you?

A. Highly developed in the sense it has a high type of residences. It is not highly developed from the——

Q. What do you consider the highest use of that five acres?

A. Residential on the Palm Canyon Drive frontage, and cottage courts or trailer courts or rental units as to the balance.

Q. How much of each?

(Testimony of Bernard G. Evans.)

A. Well, I think the zoning is 150 feet deep, and you would be prohibited from using that 150 feet for anything but residential use. [132]

Q. The 40 acres, what is that zoned for?

A. For residential or so-called guest ranch.

Q. What have you assumed would be its highest use?

A. Potential subdivision, not ripe at the present time.

Q. Not at the present time? A. Yes.

Q. For residences only?

A. For residential and small desert guest ranch type.

Q. Has your opinion changed about the value of that 40 acres?

A. It is worth less than it was two years ago.

Q. And the same is true of the five acres?

A. Yes.

Q. Your other figures were how much at the last trial for the fee title?

A. 36,500 on the five acres and 60,000 on the total.

Q. Your total figure for the three lots before was how much?

A. I believe it was 104, Judge. You mean two years ago?

Q. Well, if you don't have it before you, we can get it. A. \$104,000. [133]

Q. What are your figures this time?

A. \$95,000. It was 109. I take it back.

Q. 109, and now you are down to 95, is that it?

(Testimony of Bernard G. Evans.)

A. That is correct.

Q. Mr. Evans, are you employed regularly by the government?

A. No. Extremely irregularly. I think I have been employed once by the government since I came out of the Marine Corps five years ago.

Q. How many times have you testified for the government in the last two years, say?

A. For the federal government?

Q. Yes.

A. You were here. That is the last time.

Q. The last time was in the Lee Arenas case?

A. Yes.

Q. You are not a regular employee of the government? A. That was the last time.

Q. You work on a per diem? A. Yes.

Q. Have you worked in this case on a per diem?

A. Yes.

Q. You are not employed now by the government in any other case?

A. No. Oh, the Lee Arenas case. [134]

Q. Just the Arenas cases?

A. That is correct.

Mr. Preston: That's all.

Mr. Brett: That's all.

(Witness excused.)

Mr. Brett: I will call Mr. Donald C. Jones.

DONALD C. JONES

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Donald C. Jones.

Mr. Brett: Your Honor, before I proceed with this examination, the thought has occurred to me, and I would like to ask information of the court on it. As you are aware, I am putting my evidence on out of order, but may I have this right? If the witness which Judge Preston anticipates putting on should develop some evidence which I would desire to rebut, may I have the right to do so by witnesses, as well as by cross-examination?

The Court: Certainly. You are accommodating him.

Direct Examination

By Mr. Brett:

Q. Mr. Jones, you, too, testified in this same proceeding [135] in 1948? A. I did.

Q. And your testimony is set forth in the printed transcript of the record on appeal, which has been received in evidence as Exhibit 8? A. It is.

Mr. Brett: As I understand, Judge Preston, to save time, you will stipulate to his general qualifications?

Mr. Preston: Yes, sir, and I will stipulate the questions and answers propounded to him were correct before. I have no objection to his qualifications.

(Testimony of Donald C. Jones.)

Q. (By Mr. Brett): Mr. Jones, upon the request of the government, have you reviewed this property and re-examined it for the purpose of arriving at an opinion as to the value today?

A. Yes, I have.

Q. Without repeating the description of the property, you were present in court when Mr. Evans described the property? A. Yes.

Q. Do you adopt those descriptions as your own?

A. Yes. His descriptions of the property were quite accurate, I believe.

Q. Mr. Jones, in connection with your further examination, and also the previous investigation, did you consider [136] any transactions which you deemed to be comparable?

A. Yes. I attempted to learn the facts regarding every transaction of acreage property which has occurred in the Palm Springs district. During the course of my many appraisal experiences down there, I have accumulated a large quantity of information regarding these properties, many of which have resold since the time of my original investigation.

I have information on about 20 properties which are in some respects quite comparable, and in other respects not so comparable, to the acreage involved in this transaction.

Q. In obtaining the information, what means did you use?

A. I used the public records of Riverside County, showing the deeds of record. I used the

(Testimony of Donald C. Jones.)

interviews with the actual buyers and sellers in some instances, and conversations with the brokers who handled the transactions.

Q. Do you have before you the Respondent's Exhibit D, a map? A. Yes, sir.

Q. Would you briefly relate to the court these various transactions that you considered, limiting yourself to this: Show them by Nos. 1 to whatever numbers you use on the map, relating their location and locating them on the map, and stating the character of the property as to its description and size. [137]

A. Do you wish them in any particular order, or the order in which I have them here?

Q. Just use your own order.

A. There are some sales of residential lots on Palm Canyon Drive directly across Palm Canyon Drive from the five-acre parcel involved in this transaction.

Mr. Preston: From which property, Mr. Jones?

The Witness: The five-acre tract. Directly across the street, in the residential area fronting on Palm Canyon, in the past three years there have been about four lots transferred there by purchase for residential development, vacant lots. I have the names of the buyers and sellers, and the amount of the transactions on the lots.

Q. (By Mr. Brett): Will you indicate them, not the names or the prices, because the court has ruled that is not proper examination, but will you

(Testimony of Donald C. Jones.)

indicate the names and the numbers, so they can be referred to on the map, which is Exhibit D?

A. I am indicating on Exhibit D the sale of lots on Palm Canyon Drive opposite or directly west of the five-acre tract. I am indicating them by the numbers 1 and 2.

Q. Now, were those transactions that you considered in relation to the value which you fixed as the fee value of the five-acre tract?

A. Yes. I considered that these sales on the open [138] market of residence lots on Palm Canyon Drive were an indication of the fair market value of the property immediately across the street, were it so developed.

Q. Will you please indicate other property you considered?

A. There is a property comprising approximately 60 acres, located on the east side of Palm Canyon Drive, which extends just off of this map, and the ownership is a man named Rauber, which has been offered on the market for the past three years. It has a large sign on the property, "For Sale." I considered the offered price on that property and I considered the price Mr. Rauber paid for its acquisition in 1946.

Q. As to that, whom did you interview to get the details of the sale and the price paid at the time Mr. Rauber bought it?

A. I interviewed the broker, who handled the transaction.

Q. What was his name?

A. Mr. Cree.

(Testimony of Donald C. Jones.)

Q. You have got the name of the seller and the buyer and the price paid, have you?

A. Yes, sir. I indicate that on the exhibit as item No. 3.

Q. That name is spelled R-a-u-b-e-r? [139]]

A. I might check that, Mr. Brett. R-a-u-b-e-r, yes, sir, that is right.

Q. Did you consider that that property had some comparability?

A. I misspoke as to the agent that handled the transaction. It was Willard Gieb. I interviewed some 15 brokers in Palm Springs in regard to this general investigation. Willard Gieb was the agent.

Q. Did you consider that that property had some comparability to one of the parcels here?

A. It is somewhat superior in that it is upland property and has a commanding view of the Palm Canyon area, but it is similarly zoned for residential development at the present time, and is being developed by a scenic driveway road through it by the present owner.

Q. What property did you consider it had comparability to?

A. It had comparability to the five-acre tract for residential development.

Q. What other transactions did you consider?

A. The purchase by Paul Trousdale and Associates of a tract of land which had been developed as the Tahquitz River estate tract.

Q. Will you spell Mr. Trousdale's name and spell Tahquitz? [140]

(Testimony of Donald C. Jones.)

A. T-r-o-u-s-d-a-l-e, Paul W. Trousdale and Associates. They are the purchasers of the property. However, the title is taken in the name of the Palm Springs Tahquitz Company. That is T-a-h-q-u-i-t-z. That is the name of an Indian creek which traverses the property.

Q. Where was that property located?

A. That property is located approximately one-half mile northerly of the five-acre tract, maybe three-quarters mile northerly. It has frontage on Palm Canyon Drive, and extends from Sunny Dunes Road on the north to Mesquite Avenue on the south. The property has 136 acres of useable land. The Tahquitz Creek channel traverses the center of the property.

The property was purchased in November, 1947, from Pearl McManus. I have the purchase price and I have interviewed Mrs. McManus regarding the sale and confirmed the selling price.

Q. That was purchased as vacant land?

A. That was purchased as raw, undeveloped desert land in November, 1947. Since that time, it has been developed, partially developed. About 40 acres of the 136 acres have been developed as a residential tract with 72 homes built upon it.

Q. Will you mark that or indicate that on Respondent's Exhibit D as to its location? [141]

A. I indicate that on Exhibit D as item No. 4.

Q. Which of the parcels did you consider that that had some comparability to?

A. That property in my opinion is superior to

(Testimony of Donald C. Jones.)

the 40-acre tract here involved in the matter of its location and its zoning. In other respects, it is quite comparable.

Its topography is similar and its general uses might be considered to be similar in that the 40-acre tract is likewise possible of development for residential subdivision use.

Q. The 40 acres, however, has no frontage?

A. The 40 acres has no frontage, and access roads would have to be built to it, as well as utilities brought to it. The property purchased by Trousdale and Associates had available to it the utilities of water, gas, and electricity, immediately available.

Q. Were there any other properties that you considered?

A. Yes, quite a number. I considered the purchase by Bob Hope of a 10-acre tract on Ramon Road approximately—well, it is over a mile northerly of the 40-acre tract, but it is within a little over a half mile from the two-acre tract involved in this action.

Q. How many acres was there?

A. Ten acres were purchased by Bob Hope in this transaction. [142]

Q. Did you obtain the information as to the purchase price?

A. Yes, I did.

Q. From whom?

A. I obtained that information from Mr. Wright, the Palm Springs broker that handled the sale.

(Testimony of Donald C. Jones.)

Q. Do you have Mr. Wright's full name?

A. Billy Wright. William Wright is his full name, but he advertises himself as Billy Wright.

Q. Will you describe that property?

A. The property is just east of the Catholic school and is located on the Ramon Road frontage. It is 660 feet in dimension, 660 feet each way, a square, rectangular parcel of level land. It has frontage on Ramon Road, and also El Cielo Road.

Q. To what properties did you consider it was somewhat comparable?

A. It is comparable to the possible ultimate development of the two-acre tract, in my judgment, for residential use, and it was also comparable to the five-acre tract on south Palm Springs Canyon Drive.

Q. Will you indicate that on Respondent's Exhibit D?

A. I am indicating that transaction, the location, by the No. 19, which is the reference number I have used in [143] my sales information.

Q. Approximately how many other transactions, Mr. Jones, do you have that you deemed directly comparable?

A. Well, I have 20 transactions here involving acreage. Some of them are more removed. There is another transaction I think is an indication of the value of the 40-acre tract on Ramon Road, somewhat westerly of the piece purchased by Bob Hope. It was originally acquired by the government as an expansion of the airport, and then declared sur-

(Testimony of Donald C. Jones.)

plus property, the original owners recovering title, and they have resold the property in three transactions. There are 40 acres in the property.

Q. In what size transaction have they been sold?

A. They have sold it off in three parcels. 20 acres was purchased by a local syndicate. 10 acres was purchased by the Catholic Church of Palm Springs, and 10 acres was purchased by Leo Files.

Q. Did you obtain the information as to the price which was paid in each of those transactions?

A. Yes. I had made an appraisal of the property in 1943. I discussed the resale of the property by the owners, Ethel A. Walker and E. T. McFadden of Santa Ana.

Q. Will you locate those three properties as a unit, since they are adjoining, by some designation on Respondent's Exhibit D? [144]

A. I am indicating the 40 acres sold by McFadden and Walker by the No. 6 on this Exhibit D.

Q. I don't want to take more time in those matters, but should counsel desire to question you as to the others, you have the information and could also indicate their location by describing and by placing them on this or any map of similar character?

A. I could.

Q. And in what respects you consider them comparable?

A. Yes, sir, I could.

Q. Now, Mr. Jones, have you formed an opinion as to the present-day value, that is, the today's value in fee, that is the market value in fee of this two-acre parcel?

A. I have.

(Testimony of Donald C. Jones.)

Q. And what is that opinion?

A. In my opinion, the two-acre parcel for fee simple title thereto at the present time has a value of \$12,800.

Q. That would be \$6,400 per acre?

A. Yes, sir.

The Court: 12 thousand what?

The Witness: \$12,800, or at the rate of \$6,400 per acre.

Q. (By Mr. Brett): Could you briefly state the reasons for that opinion? [145]

A. That opinion is based upon a consideration of the development of the property surrounding it, the development on the subject property, its present uses, its present income possibilities, and the sales of properties in the perimeter lands southerly of Section 14, which I have already mentioned.

Q. Mr. Jones, I don't want you to go into any considerable detail, because of time, but, briefly, will you indicate what those first two or three points are, which you refer to when you say the surrounding area and what you refer to when you say the development in the area?

A. The property is located in the approximate center of a helter-skelter development of shacks and low-grade cottages, which has sprung up without regard to regulation of any kind.

I think that any development of the property necessitates the eradication of that helter-skelter, unregulated present condition. However, the in-

(Testimony of Donald C. Jones.)

come from this property under present conditions is such that I consider the value of the property greater than it would be developed as a residential tract.

I don't know whether I am permitted to say what the income stream is, but I know what the income stream is from these shacks on there, and it is greater than could be anticipated from any other development of the property, in my judgment. [146]

Q. Do you have an opinion as to the fair market value today of the fee simple of the five-acre parcel?

A. Yes, I have.

Q. What is that opinion?

A. In my opinion, the five-acre tract has a present market value for fee simple title of \$35,000, or at the rate of \$7,000 per acre.

Q. Will you state your reasons for that opinion?

A. I base that opinion upon the adaptability of the property for residential development of the 150-foot depth fronting on Palm Canyon Drive, and the prices now being paid for residential property fronting on Palm Canyon Drive in the immediate vicinity, and for the possible use of the remaining land for trailer court development, for which it is presently zoned, or for further residential development of the property.

Q. Do you have an opinion as to the fair market value of the fee simple title to the 40-acre parcel as of today?

A. I do.

Q. And what is that opinion?

A. In my opinion, the fee value of the 40-acre

(Testimony of Donald C. Jones.)

tract as of today is \$54,000 or at the rate of \$1,350 per acre.

Q. Will you give your reasons for that opinion aside from those already given? [147]

A. That property has no present water supply. By that I mean there is no water piped to the property. There are no streets to the property. It is zoned for guest ranch development, that is, large tracts of desert land upon which a man builds his home for a gentleman's estate, you might call it.

The property would require expensive development to command a market today. It lies isolated from any other developed area.

By comparison of the sales of other acreage tracts, in my opinion the highest price this property could command today is \$1,350 an acre.

Q. Now, Mr. Jones, assume that the interest of Eleuteria Brown Arenas in the 2-acre parcel, the 5-acre parcel, and the 40-acre parcel, described in the complaint in 6221-PH Civil, as represented by the trust patent in severalty conveyed to her, consists of the vested right to receive at a subsequent date which is not now known, providing that she does not die in the meantime, a conveyance in fee simple absolute to such property, and that until such conveyance has been made and delivered she has the right to personally use and occupy all of such property, and has the further right to lease such property for grazing or farming purposes for not to exceed ten years, providing that such lease is first approved by the Secretary of the [148]

(Testimony of Donald C. Jones.)

Interior of the United States or his authorized representative, and has the right to lease such property to a third party or parties, who are not Indians, for business purposes, for not to exceed five years, providing that such lease is first approved by the Secretary of the Interior of the United States or his authorized representative; that she is entitled to receive the income derived from such leases unless the Secretary of the Interior of the United States shall determine in his discretion that such income shall be held in trust for her benefit by the Office of Indian Affairs; that the present trust period expires on May 9, 1952, but may be continued for periods not to exceed 25 years without her consent and at the sole discretion of the President of the United States; that during the last 30 years all trust patents in severalty have been extended for 25-year periods prior to their expiration by a general Executive Order issued by the President of the United States, regardless of his political affiliation, and there is no present record of any change in the policy of the present incumbent of that office; that, in the event of her death before she receives such patent in fee simple and free of restrictions, her rights will descend to her heirs at law, except that with the consent and approval of the Secretary of the Interior of the United States, she may dispose of the same by Will; that until she receives a patent in fee simple free of restrictions, she may not sell [149] and may not encumber her interest under such trust patent to

(Testimony of Donald C. Jones.)

any extent or for any purpose, and assume that it is such interest that would be transferred by a conveyance and that the purchaser would acquire such interest subject to the same conditions, what, in your opinion would be the fair market value of such interest in said 2-acre tract?

A. Yes, I have an opinion of the trust patent rights in the two-acre tract, assuming that can be sold.

Mr. Preston: Will you read that answer, please?

(Answer read by reporter.)

Q. (By Mr. Brett): What is that opinion?

A. In my opinion, that value is \$6,400 or 50 per cent of the fee value.

Q. Do you have an opinion of the fair market value of such interest in the five-acre tract as of today? A. Yes, sir, I have.

Q. What is that opinion?

A. In my opinion, that is likewise 50 per cent of the fee value, or \$17,500.

Q. And do you have an opinion as to the fair market value of such interest in the 40-acre tract as of today? A. Yes, I have.

Q. What is that opinion?

A. \$13,500 or 25 per cent of the fee value.

Q. Will you give your reasons for those [150] opinions, Mr. Jones?

A. In my opinion, the limitations upon the use of the property—by that I mean the inability of the owner of this property to hypothecate it in

(Testimony of Donald C. Jones.)

any way for its future development, he can't borrow money on it, he can't sell it, I think that would bring a sales resistance to this property equal to at least 50 per cent of its fee value.

In the case of the 40-acre tract, which is undeveloped and has no income possibility, I think it will amount to 75 per cent of the fee value, or leaving only 25 per cent of the value for this trust patent right, because of the restrictions making it impossible to hypothecate the property in any way.

Q. Now, Mr. Jones, your opinion as to the trust patent value as expressed on the basis of today's value is greater than the opinion you expressed in October, 1948, is it not? A. Yes, it is.

Q. Will you explain the reason for the difference?

A. The reason is that in 1948, these properties could be leased for five years, but the leases all contained a cancellation clause, 30-day cancellation clause, which was tantamount to only a 30-day lease. Now the properties can be leased for five years, but that restriction has been removed. Consequently, a man can expect to enjoy the income from the [151] property for five years, as against a 30-day period.

Q. Is there a difference in your opinion of the fee title value expressed as of today, as compared to 1948?

A. Yes. I have reduced the value of the fee title 10 per cent from what they were in 1948, which I base upon my investigation of the general

(Testimony of Donald C. Jones.)

economic conditions in Palm Springs affecting real estate, the general lack in volume of sales, the selling of property at discounted prices from what they were held at in 1948.

Mr. Brett: You may take the witness on cross-examination.

Cross-Examination

By Mr. Preston:

Q. Mr. Jones, the theoretical purchaser of this restricted area comprised of these three parcels would be a person to whom the trustee or the government would owe no duty whatsoever, would he? Or would he be a purchaser to whom the government would have to act in his best interests?

A. I am assuming that the purchaser would acquire the same rights as the Indian now has, and I am assuming that the government is acting as trustee for the Indian in his best interest.

Q. You are assuming that the government would be the trustee for the purchaser?

A. That is the assumption I am making, Judge, yes, [152] sir.

Q. You would assume that the government was the trustee of the purchaser, would you?

A. I would have to so assume, yes, sir.

Q. And that the government had consented to the sale or not consented to the sale?

A. I am assuming that the government would consent to the sale. Otherwise, there would be no sale.

(Testimony of Donald C. Jones.)

Q. What would the purchaser not get in the way of title under your assumption?

A. The purchaser would acquire the rights, the trust patent rights now held by the Indian.

Q. If the government consented to the transfer by the Indian of all his rights to this purchaser, why isn't that a full fee conveyance?

Mr. Brett: Object to that, if the court please, as calling for a conclusion of the witness and a question of law.

The Court: It is a question of law. Sustained. The court has got to do something about that.

Mr. Preston: I saw your Honor take an interest in it. I thought you might like to have it answered.

The Witness: I have a legal——

The Court: Never mind, now.

Q. (By Mr. Preston): We have a case here now where [153] the government has consented to the sale of the Indian's rights and yet retained, according to your view, the right to supervise it afterwards, is that right?

A. I answered the hypothetical question which was propounded to me, Judge Preston, in which I assumed all the things were true.

Q. You are not retracting the statement, are you, that you have assumed that the government would consent to the sale?

Mr. Brett: Of that particular interest, as so restricted, yes.

(Testimony of Donald C. Jones.)

Mr. Preston: Just a minute. Let the witness answer. You are not on the stand.

The Court: You are still arguing a legal question.

Mr. Brett: I will then object to it on the ground it is a legal question.

The Court: I have sustained the objection as a legal question.

Mr. Preston: I am asking what he assumed, not what the facts are.

Q. Now, Mr. Jones, here is Indian A with a good allotment, two acres we will say, in Section 14. Have you considered in making up your mind what the value of that property would be to him to keep?

A. I haven't made any assumptions as to what the [154] individual Indian might expect to get from it if he kept it, no. I have assumed what I think is the fair market value of it on the open market to any buyer, not to the individual Indian.

Q. You have given your opinion based upon these restrictions, which you consider burdensome, on the title of the property?

A. I have as to the trust patent, but not as to fee title.

Q. You would be surprised if you found anybody that would pay anything for it, would you not?

A. No, I wouldn't say that is true. As to the two-acre parcel, it has a very substantial income stream, which I am familiar with. I think the

(Testimony of Donald C. Jones.)

purchaser of the trust patent would enjoy that, and it would be an investment that would merit considerable thought.

Q. He couldn't sell it?

A. No. That would be a considerable handicap, and I have discounted it 50 per cent.

Q. Let's take the two-acre parcel. You have considered it is in helter-skelter development.

A. Yes, sir.

Q. And to be any good, you would have to have that eradicated?

A. No, sir. To be any good from a monetary standpoint—— [155]

Q. Better kept it the way it is?

A. I think it would be all right from a revenue-producing standpoint.

The Court: It is now time to adjourn. This may last some time. We will recess now until 10:00 o'clock tomorrow morning.

(Whereupon, a recess was taken until the following day, Wednesday, November 29, 1950, at 10:00 o'clock, a.m.) [156]

Wednesday, November 29, 1950. 10:00 A.M.

The Clerk: Eleuteria Brown Arenas v. U. S. A., No. 6221-PH Civil, further hearing.

The Court: You may proceed.

Mr. Brett: We were directed by Judge Mathes to inform you that the companion case, the Lee Arenas case, which also involves attorney's fees, was set over to February 6th.

(Testimony of Donald C. Jones.)

The Court: Then he wants us to go right along.

Mr. Brett: We understand that, but I am merely reporting to you what he told us.

Mr. Preston: There is no suggestion this case will hang on until February 6th?

Mr. Brett: No. There was no purpose or intent, except to report.

The Court: I understand.

Mr. Brett: This is to be continued cross-examination of my witness, your Honor.

DONALD C. JONES

called as a witness by and on behalf of the respondents, resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Preston:

Q. Mr. Jones, your figures, when you testified at the [158] previous hearing, were \$12,800.00 on the two-acre tract, \$40,000.00 on the five acre tract, \$60,000.00 on the 40-acre tract. Is that correct?

A. That was my opinion of the fee value as of 1948.

Q. Just answer the question and we will get along all right.

A. Yes, sir, it was the value of 1948.

Mr. Brett: If the Court please, the witness at that time, as well as yesterday, gave two different valuations. He gave a valuation of the fee and a

(Testimony of Donald C. Jones.)

valuation of the trust patent, and I think he is entitled in his answer to state that the figures the Judge asked were his figures of the fee valuation.

Mr. Preston: I want him to just answer my question.

The Court: Yes, and then you can question him.

Mr. Preston: I want him to answer my question and then he can say he has amended his figures so that the total now, instead of \$112,800.00, is \$100,800.00.

The Witness: That is my opinion of the value in 1950.

Q. (By Mr. Preston): What is that?

A. That is my opinion of the fee value of the property in 1950.

Q. 1950?

A. As of now. That was the question propounded to me.

Q. I understand that. I wanted to review it and see if I understood you. Now, Mr. Jones, you know what market [159] is in the contemplation of law?

A. Yes, I do.

Q. You can recite the definition, can you not?

A. I can recite several. I can recite the one handed down by the Supreme Court of the State of California.

Q. Give us your definition of it, Mr. Jones.

A. Market value, fair market value, is that price which a willing purchaser will pay for a property when it is exposed for sale on the open market,

(Testimony of Donald C. Jones.)

knowing all the uses and adaptabilities of the property in question, and a willing seller will accept for that property, he also knowing all the uses and adaptabilities of that property, with a reasonable time allowed in which to consummate the transaction.

Q. Have you considered all the uses and adaptabilities of the two-acre tract?

A. I believe I have. I have attempted to.

Q. And the five-acre tract?

A. I believe so, sir.

Q. And the 40-acre tract?

A. I have attempted to, yes, sir.

Q. Have you considered that the two-acre tract might be rezoned for business purposes?

A. It could presumably be rezoned for such use. In my opinion——

Q. What? [160]

A. In my opinion, it would be some time before the property can have any adaptability for such use.

Q. I am not asking you that at all. I am asking you whether you had considered whether or not it could be properly rezoned for business property. Answer that.

A. Not in the immediate future, in my opinion, would it be properly rezoned for business.

Q. I am not asking you that. Did you consider that it was adapted for rezoning for business property?

(Testimony of Donald C. Jones.)

A. No, I wouldn't consider it was adapted for business property.

Q. You wouldn't consider it was adapted for business property, and you haven't considered that element in making up your value figures?

A. My value of the two-acres——

Q. Just answer that question.

Mr. Brett: What is the element?

Mr. Preston: Adaptability for business purposes.

The Witness: The property at present is being used for income business purposes.

Q. (By Mr. Preston): Will you please answer my question? Have you considered that this property, these two acres, are adaptable in your opinion for business purposes? A. It is now so used.

Q. It is now so used? [161]

A. It is now used for rental income purposes, which is a business purpose.

Q. I am talking about general business purposes.

A. In my opinion, the property is not adapted to that use, Mr. Preston. It may be sometime in the future, but it is so far removed from the business district of Palm Springs that in my judgment that is far in the future.

Q. What are you talking about? The two-acre tract?

A. The two-acre tract on the dirt road.

Q. How far is it from Indian Avenue?

A. It is a little less than a quarter of a mile.

Q. From Indian Avenue?

(Testimony of Donald C. Jones.)

A. Yes, sir. The one side of it is less than that. One tier of lots between it and Indian Avenue, 580 feet.

Q. 528 feet from its southwest corner to Indian Avenue, isn't that true? A. That is true.

Q. And what is the length of the two-acre tract?

A. The length of it?

Q. Yes, east and west.

Mr. Brett: The width, that would be, wouldn't it? Oh, yes, the length.

The Witness: I have the exact dimensions of it. It is 528 feet in length.

Q. (By Mr. Preston): 528 feet in length, and that is the [162] distance from one of the main streets in the business area of Palm Springs, isn't it? A. Yes.

Q. The whole business area is in Section 15, is it not?

A. The business area is in Section 15, yes, sir.

Q. And Section 15 lies immediately west of Section 14, does it not? A. It does, yes, sir.

Q. And the Brown property is 528 feet from the west section line, is it not? A. That is true.

Q. And you consider that too remote to be of any prospective value?

A. It is, in the immediate foreseeable future, in my judgment, yes, sir.

Q. You priced the five-acre tract at a higher value per acre than the two-acre tract, didn't you?

A. No, sir. Quite the reverse.

Q. What is the difference?

(Testimony of Donald C. Jones.)

A. Oh, I beg your pardon. I was thinking of the 40 acres. Yes, sir, I did.

Q. That is how far from the business district of Palm Springs? A. About a mile.

Q. A mile and a quarter or a mile and three-quarters, [163] is it not?

A. Yes, about a mile and a half to a mile and three-quarters.

Q. A mile and a half to a mile and three-quarters, and you placed a figure on that property higher than you did on the two-acre property which lies 528 feet from the east boundary of Indian Avenue?

A. Yes, the per-acre value, I did, yes, sir.

Q. You did that, did you?

A. Yes, sir, I did.

Q. Why did you do that?

A. Because in my judgment, Judge Preston, the two-acre tract, although it is only 528 feet from the main street of Palm Springs, its highest value is represented by its present income stream.

Q. What I am trying to get at is, you have made your valuation upon its present situation, have you not? A. I have, yes, sir.

Q. You have considered, as I remember, three things. The development around the two acres, is that right? A. Yes, I have.

Q. The present use of the two acres?

A. Yes, sir.

Q. And the present income from the two acres?

A. I have, yes, sir. [164]

(Testimony of Donald C. Jones.)

Q. And your figures are based upon those assumptions, those facts?

A. Yes, sir. I am considering its present value.

Q. And that is solely the basis of your opinion, is it not?

A. No. I have considerable information regarding the plans of development of Section 14, which may or may not take place, and I am unable to predict the future value of that property.

Q. You haven't given it any weight, have you, in your opinion?

A. No. I have given no weight to the possibility of the development of a second Indian Avenue 500 feet east of the present one.

Q. Can't you answer my question directly? Have you given this element any consideration in the valuation you placed upon the two acres?

Mr. Brett: Just a minute. If the Court please, before the witness is required to answer that, I submit he should be allowed to finish his previous answer.

The Court: He can do so in this answer.

Mr. Preston: It is not responsive.

The Witness: I have not given any consideration to the development of a second Indian Avenue easterly of the present one, if that is the import of your question, sir. [165]

Q. (By Mr. Preston): The fact that Indian Avenue might be widened has not been considered by you?

(Testimony of Donald C. Jones.)

A. Yes, sir, I know that is possible.

Q. What?

A. I realize there are efforts being made to widen Indian Avenue.

Q. Did that enter into the valuation you placed on the two acres? A. No, sir.

Q. It did not? A. No, sir.

Q. You realize, do you not, since you testified before, allotment proceedings have been practically completed on a great portion of Section 14?

A. I understand so.

Q. That has not added to the value of it in any way, has it?

A. It was my information the only change in status of the trust patent rights is that they now may be leased for five years without cancellation clauses.

Q. I am asking you if that has made any difference in your figures?

Mr. Brett: As to which value, Judge?

Mr. Preston: As to either of the values.

The Witness: Yes. My opinion of the value of the trust [166] patent rights is considerably increased from what it was in 1948.

Q. (By Mr. Preston): We will separate it. Take the fee title to the two acres. Has the market value of that title, in your opinion, been changed any because of the completion, or practical completion, of these allotments? A. No, sir.

Q. It has not?

A. No. I haven't changed my opinion of the

(Testimony of Donald C. Jones.)

market value of the fee title because of completion of some more allotments.

Q. Have you considered the fact that a purchaser might want to purchase a bunch from these allotments?

Mr. Brett: If the Court please, I will object to that on the ground that calls for incompetent and irrelevant matter. That has nothing to do with the value of this particular property, the fact that some purchaser might want to purchase some of the property and join it.

Mr. Preston: Your Honor, that is not correct. A piece of property, a town lot sitting in a reservoir site, could be of value because it would be susceptible of uniting with the surrounding contiguous territory to form the bed of a reservoir. This is cross-examination.

The Court: The objection is overruled. Go ahead.

The Witness: I have not contemplated the acquisition of [167] a large number of these allotments by any particular individual as increasing the value or depreciating the value. I have considered, if all of Section 14, or even the westerly half of it, were all upon the market, it would have a deflating effect upon the market value of all properties in Palm Springs.

Q. (By Mr. Preston): Was that your testimony at the last hearing?

A. I don't believe I was asked regarding that matter.

(Testimony of Donald C. Jones.)

Q. Did you testify on that subject, if you remember?

A. As to the placing of Section 14 on the market?

Q. Yes.

A. I don't recall that I did. Perhaps I did.

Q. I don't hear you.

A. I don't recall, Judge Preston, if I was interrogated regarding the placing of Section 14 on the market.

Q. All right. I will see if I can find it for you. I will show you page 245 of the printed transcript, which is a reproduction of Exhibit 8. Read beginning with the last question on page 245, and read from there down to question two from the bottom of page 246.

I will ask you if I didn't propound these questions to you and if you didn't give these answers:

"Q. If the entire Section 14 were thrown open to free market and sale, what would be your opinion as to the value, then, of a two-acre tract situated therein [168] such as this one in question?

"Mr. Brett: Your Honor, I understand my objection has been overruled?

"The Court: Yes.

"The Witness: I would hardly be prepared to voice an opinion as to what the value of the land might be, if it were all cleaned up of the present environment that is there and also for development, for the expansion of the Palm

(Testimony of Donald C. Jones.)

Springs business center. It is reasonable to assume that the prices would be higher. As to how much higher they would go rapidly, I cannot say. There is a large area there and the development of the Palm Springs business district would not be reasonably expected to absorb it so fast that prices would greatly increase over—in my present opinion, however, I think they would go up.

“Q. (By Mr. Preston): There is a great demand, is there not, for business property in Palm Springs, at this time?

“A. Well, there is a demand which has somewhat slackened off, but there has been quite an active demand, yes, sir.

“Q. It still obtains to a substantial degree, does it not?

“A. Yes, very high prices for property are being [169] paid, for property on the main street.

“Q. Very high prices are being paid now?

“A. Yes, sir.

Did you give those answers to those questions?

A. Yes, I did.

Q. Isn't that a complete change from the statement you have just made?

A. I hardly think so, Judge Preston.

Q. What is the difference?

A. The prices which are paid for property on the main street are still high. The price which

(Testimony of Donald C. Jones.)

might be paid if all this property were put on the market, I think would be problematical.

Q. Didn't you say, Mr. Jones, that prices would rise in this Section 14?

A. I think it is reasonable to assume some of them would. I don't think they would rise all over the area, Mr. Preston.

Q. Didn't you say already; since you have been on the stand at this hearing, that it would be demoralizing to the prices?

A. Yes, if the entire section were placed on the market. That was my opinion when I gave this answer.

Q. You think those two statements harmonize, do you?

A. I think they harmonize to the extent of inquiring [170] here about whether there might be some expansion of business area in Section 14.

Mr. Brett: If the Court please, at this time, while I think the matter is a matter for cross-examination, I would move to strike it as being incompetent and irrelevant, and upon the basis of the California law, as fixed in the case of *City of Los Angeles v. Geiger*, reported in 94 Cal. Appellate 2d, page 180, at page 190, and in 210 Pacific 2d, page 717, at 724, in which the court of last resort of this State says as follows:

“Moreover, the valuation of the property and the damages thereto should have been determined in view of physical conditions actually existing on the date the value was required by law to be fixed, and

(Testimony of Donald C. Jones.)

not with reference to a hoped for or conjectured prospective event or to conditions as they might be if changed thereafter, nor even with reference to what was then reasonably foreseeable in the future."

Now, if the Court please, these questions are on an assumption that an entire change be made in the entire allotment system and all allotments be wiped out and that the property thrown on the market as unrestricted property.

In the first place, it is something that is extremely remote, and certainly speculative, but even assuming it were, under the settled law in this jurisdiction, which I believe [171] this court would follow, as far as substantive law is concerned, it is not a proper element of value, and I move to strike it out.

Mr. Preston: That is not in harmony with the decision of this case and is undoubtedly erroneous, because the very elements of market value are that you consider all the uses for which the property is adaptable, and it might be adaptable to a use that it is not being put to at this time, and it might in a very short time be used for that very purpose. So it is the adaptability.

If his construction were accepted, it would negate the very definition the witness gave of market value.

I say this is proper cross-examination of this witness. There is nothing before the court, anyway.

Mr. Brett: In answer to that, the Supreme Court of the State of California, in the case of

(Testimony of Donald C. Jones.)

Long Beach City School District v. Stewart, reported in 30 Cal. 2d at page 763, has squarely held that adaptability in the eyes of the law from the standpoint of market value means availability at that time and under conditions then existing.

It is true, as Judge Preston says, you may consider not only that which is actually being done, but that which is potential, but you may not consider that the potentials exist only if conditions have to be changed. In other words, you are not bound by what use is being made and you are not [172] required to disavow from consideration matters which are capable of being done, but if it requires an act of some other body or something that will change either the physical or legal condition, and something that is conjectural, as it is here, because your Honor will take judicial notice of the fact that to wipe out the allotment system you would have to have some means to take that away from the Indians, and to remove the restrictions and to clear the thing out—that is the purport of his question—and under those circumstances I submit respectfully it is not a material or relevant matter in this case and I move to strike it out.

Mr. Preston: It is cross-examination to test the opinion of the witness, if your Honor please, and is admissible for the purpose of showing whether or not he has given full effect to the proper definition of market value.

The Court: The motion to strike will be denied.

Q. (By Mr. Preston): When it came to the

(Testimony of Donald C. Jones.)

five-acre tract, what adaptability did you consider with reference to that tract?

A. That the frontage of the five-acre tract on Palm Canyon Drive was available and immediately usable for residential development; that the rear portion of the tract would be available and immediately usable for use as trailer park; that the entire five acres could be subdivided into residential tracts. [173]

Q. Any other use?

A. I don't think of any higher use, Judge Preston.

Q. That, in your opinion, is the highest use of the five acres, is that right?

A. That is my opinion, yes, sir.

Q. Had you assumed it had a water right?

A. It has a water right and has city water available, also.

Q. Take the 40-acre tract. You said yesterday there was no water available there.

A. There is no water immediately available to the property. It would have to be brought to it.

Q. If you assumed that water was available there, then would your figures go up or down?

A. I assume that the water—By “available” perhaps we are not in accord with what I meant. The property has a water right, but there is no water immediately available to it. It has to be brought to it at the expense of the developer.

Q. Why is it worth only \$1,500.00 an acre more

(Testimony of Donald C. Jones.)

or less, when the five-acre tract is worth \$7,000.00 more or less? What makes the difference?

A. The difference is, the five-acre tract can be immediately developed. The 40-acre tract is so far removed from any accessibility that roads must be built and the entire thing has to be developed from the ground up. It lies out in [174] the center of a wash area. Flood control would have to be provided, roads built, all utilities would have to be brought to the property, and it is not, in my judgment, now ready or ripe for any such development.

There are too many other lands more favorably situated, which are not by any means even 50 per cent sold out.

Q. What use is it best adapted for?

A. It has potential adaptability for guest ranch development and residential desert site development.

Q. Both residence, and what kind of ranch?

A. Guest ranch, residential.

Q. And subdivision, too?

A. Yes, on a larger scale, in five-acre tracts, we will say. I think the development of it into small lots for residential use is very remote.

Q. If it were located immediately east, say, of the five-acre tract, would it have better value than it has now?

A. The closer it would be to development, the better would be its values, yes.

Q. It is near, is it not, to the highway, another

(Testimony of Donald C. Jones.)

highway there? What is the distance from the state highway that borders the north boundary of that section? A. 2600 feet.

Q. 3600 feet? A. 2600 feet. [175]

Q. 2600 feet. Mr. Jones, your employment by the Government is more or less regular, is it?

A. I have had considerable employment by the Department of Justice.

Q. Over a period of about how many years?

A. Well, I have been employed by them off and on over the past 10 years.

Q. Ten years. Have you any other clients, or does the Government take up all your time?

A. Yes, sir, I have a great many other clients.

Q. What proportion of your time do you give to the Government service?

A. I would estimate perhaps 20 per cent.

Q. You estimate it is 20 per cent?

A. To the Federal Government.

Q. When did you start as an appraiser?

A. In 1927.

Q. What makes one piece of property comparable to another when you are fixing valuations?

A. What makes a property comparable to another?

Q. Yes. What factors are comparable when you are comparing two pieces of property? What factors must be present to make their comparison legitimate?

A. They must have similar environment, sim-

(Testimony of Donald C. Jones.)

ilar topography, similar uses and [176] adaptabilities.

Q. There is no property, then, around Palm Springs that is comparable with the two acres in Section 14, except other property in that section, is there?

A. Because of environment factors, that is true, but as to other factors, they are comparable, as to location, possible uses.

Q. But you haven't allowed for anything else except the development around this property and the use that is being made of it now, and the income that is coming out of it?

A. My problem was to appraise the present market value of the property and I am unable to foresee what might happen in the far distant future affecting value.

Q. Perhaps I am not making myself clear, but I am trying to find out if, in your opinion, there is any comparable property outside of Section 14 to compare this property to.

A. There are other properties which are comparable in all respects, their environment factors excepted, yes, sir.

Q. All except the environment, and except the use that is being made of them, and the income that is coming from them? A. Yes.

Q. The three things you used in your value of the two acres are not present in any other locality, are they?

A. Oh, yes, the other factors are present. The

(Testimony of Donald C. Jones.)

income possibility, the use possibility, but not the environment of [177] the dilapidated shacks.

Q. Then the devastating environment is not present at any other place, is it?

A. No, it is not.

Q. Therefore, this property stands practically alone, does it not, in your estimation?

A. In that sense, it certainly does.

Q. And you don't know of any real standard to measure it by, then, do you, other than what you have mentioned?

A. I don't know of any real standard to measure it by other than its income stream, which is in excess of what it might be were it removed from it.

Q. Do you recognize it would be feasible for the business district of Palm Springs to move east?

A. Yes, I think it will gradually move east.

Q. In that event, this property might be taken and utilized for a different purpose?

A. Not in the foreseeable prospect.

Q. Answer my question first.

A. That is my answer.

Q. You think it would take a long, long time?

A. It would be, in my judgment, a long time before it would be business property. I think the growth of business will be on Arenas Street, the main east and west street.

Q. It is true that west of Section 15 there [178] is a mountain, is there not? A. Yes.

Q. A big mountain?

(Testimony of Donald C. Jones.)

A. A big mountain lies west of Section 14 and lies west of the business district about a mile to the base.

Q. Well, we don't want to give up the golf course.

A. There is a mountain there.

Mr. Preston: That's all, Mr. Jones, as far as I am concerned.

Mr. Brett: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Preston: May it please the Court, I have had a disappointment. I had an expert that said he would be here yesterday for sure, and I thought yesterday morning, and certainly yesterday afternoon. He has not shown up and he is not here today.

I have in the courtroom a witness who testified in the Lee Arenas hearing, that made an investigation of the Lee Arenas property and also this property, because this property is absolutely contiguous to the Lee Arenas property and every tract joins. In investigating that, he had to necessarily investigate this, and with the court's consent I would like to put him on the witness stand.

The Court: You may do so. [179]

Mr. Preston. Mr. Gallagher, will you take the stand, please?

JOSEPH A. GALLAGHER

called as a witness by and on behalf of the petitioners, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Joseph A. Gallagher.

Direct Examination

By Mr. Preston:

Q. Mr. Gallagher, you are a resident of the City of Los Angeles? A. I am.

Q. And you have a profession that you follow. What is it?

A. I am a licensed real estate broker and an appraiser, and president of the American Right of Way and Appraisal Contractors.

Q. That company that you last mentioned is a concern organized by you? A. Yes, sir.

Q. How long has it been in existence?

A. About five years.

Q. And what is the business of that concern?

A. We specialize in the appraisal of properties for governmental agencies, governmental bodies, and utility [180] companies, and then in the acquisition of rights of way for both governmental bodies and utility companies.

Q. Do you keep a staff of employees and experts in your organization? A. I do.

Q. About how many have you at the present time?

A. On our pay roll at the present time, we have

(Testimony of Joseph A. Gallagher.)

about eight, but we have a great many others who are on constant call, for instance, surveyors and engineers on certain jobs.

Well, for instance, we just completed a 600-mile deal for Standard Oil Company in Utah, Idaho, Oregon, and Washington. We didn't have to bring any engineers in on that job, because Standard's engineers did that work, but in some instances it is necessary, and that is when we bring them in.

Q. Give us a brief narrative of your experience as an appraiser, particularly your connection with the public bodies of this State and Nation, say, over the last 10 or 15 years.

A. I did appraisal work for the Department of Water and Power in the City of Los Angeles in the '30s in the construction of or for the construction of Boulder Canyon transmission line from Boulder Dam.

Also for water supply which the department proposed to bring in from a location north of Bishop, somewhat in the general area of Levining.

Then we did several other jobs for the department at that [181] time.

Q. What other public body have you done appraisal work for?

A. I have done work for the Department of Finance and the State of California, quite a few appraisal jobs for the department.

The United States Treasury, San Francisco office, called me in on a job somewhere in the general location of Pismo Beach. That was on a ship-

(Testimony of Joseph A. Gallagher.)

yard, San Francisco shipyard, that had been taken over by the Department. I didn't do too much work on that. However, I was called in to appraise machinery.

The County of Ventura, I handled the appraisal and the acquisition of rights of way of Matilija Dam and Casitas Dam, and also for the Ventura River levee, from the ocean back to the oil field, which was a distance of approximately two and a half miles. I appraised all that property.

Q. Did it comprise both rural and business?

A. Yes, we had business properties there. There were service stations and motels and some business houses and some groves, and then some raw land, too, like the Taylor Ranch in Ventura County, a very large ranch, possibly one of the largest ranches in Ventura County. We didn't appraise the ranch. We appraised quite a large taking strip along the Ventura River levee, which was formerly a part of the Taylor Ranch.

The widening of Foothill Boulevard in Pasadena, we [182] appraised that for the City of Pasadena, with the State of California having an interest in the widening of the boulevard itself. We appraised and acquired the right of way.

Rosecrans in Compton, the same situation prevailed there.

With Standard and with the Texas Oil Company, I have already mentioned the 600-mile deal for Standard through those neighboring States. There was a 175-mile deal in the early '40s, from

(Testimony of Joseph A. Gallagher.)

Kettleman Hills to San Francisco, and several other jobs in Los Angeles County.

With the Texas Oil Company, there was about a 96-mile acquisition through Kern County, Fresno, Tulare, Stanislaus, and a few other counties.

Associated Oil, approximately 26 miles in Santa Barbara County, in the general area of Gavota Pass, with the waste water disposal districts. These districts reach all the larger oil companies in Southern California. We represented the district in the area of Signal Hill, water coming from the wells that must be disposed of in a particular area.

Also, the Santa Fe Waste Water Disposal District, we represented them in a couple of instances, and we are representing them at the present time.

The Southern California Gas and Southern Counties Gas, we appraised and acquired rights of way for the Big Inch gas line, which originated in Texas and New Mexico. However, our appraisal work started at the Colorado River east of [183] Blythe and terminated in Santa Fe Springs, Los Angeles.

Q. A distance of how many miles?

A. About 267 miles, more or less. I may be somewhat incorrect.

Q. Did that take you near the Palm Springs area?

A. Yes, it did. We were north of the Palm Springs area. We were north of the highway over near One Thousand Palms. After we left Indio, we were on the—well, it worked back into the

(Testimony of Joseph A. Gallagher.)

mountains between Indio and Banning and Beaumont. We were about two and a half miles north of One Thousand Palms, for instance, north of the Alonzo Bell property and Hidden Springs Ranch. That is Charley Doyle's property.

As I say, that terminated in Los Angeles, but it took in the Palm Springs area.

We have done—when I say “we,” I like to use the word “we” instead of “I”—we have done a considerable amount of appraisal work for the Southern California Edison Company. As a matter of fact, I believe we do most of Edison's appraisal work. In the last year, I believe we have done 35 or 40 appraisal jobs for Edison. Here recently we completed about a 39-mile appraisal for the proposed construction of a transmission line along the San Gabriel River in Los Angeles County, both sides. We are now negotiating and acquiring the rights of way for this transmissison line.

We are doing work now—we didn't appraise, however, but [184] we are acquiring properties in four different areas. The newspapers call them “slum clearances.” That is the Housing Authority of the City of Los Angeles. We are working on two of those projects. Our contract calls for four, for appraising the entire area of four of them. One we are working on is Rosehill. I had a call this morning on the Aliso Pico, which is over on First Street. We are preparing, and we are ready to start on that. They want us to start tomorrow.

(Testimony of Joseph A. Gallagher.)

That, in general, Judge, takes in some of them. There are more, but that is general.

Q. I assume you have been pretty busy.

A. I have been awfully busy, and it has been hard to come to court.

Q. Are you a graduate of a university?

A. Yes, a Catholic university.

Q. What is it? Notre Dame? A. Yes.

Q. That's a good school. What degree did you take at Notre Dame?

A. I had my bachelor's and master's there.

Q. Were you ever sent by the City of Los Angeles to visit any other States which involved appraisal work?

A. Not exactly appraisal work, Judge.

Q. I won't dwell on it, then.

A. I was sent by the Department of Water and Power, I [185] believe it was in 1934, and, well, there were quite a few assignments that I was given at that time, in Phoenix, Arizona; Sullivan, Missouri; Wheeling, West Virginia; Ashland, Kentucky. I went as far as Wheeling, West Virginia, and then worked back in Milwaukee, Chicago, and Kansas City.

Q. What really was your main object there?

A. In acquiring rights of way, rights of way, that is, for the Boulder Canyon transmission line. At Knoxville, Tennessee, it was on a damage suit that was brought against the city. The purpose of that was to locate a certain party and bring him back as a witness.

(Testimony of Joseph A. Gallagher.)

The following year the department sent me up to Victoria, British Columbia, and Vancouver, British Columbia.

Q. Have you told all the experience you have had in appraisal work in or near the Palm Springs area prior to the time I am about to question you on?

A. There was a little job I did in Palm Springs that didn't amount to too much. Dolores Hope was interested in buying some property. I don't remember now which section that property was located on. I did at the time I testified in 1947. I believe it was the first investment that Dolores herself made, and she did that irrespective of Bob at the time.

Before she bought, I did appraise those lots. I forget what she paid.

Q. Have you been acquainted with the City of Palm [186] Springs and watched its growth and development?

A. Yes.

Q. I will ask you whether or not, at the request of the petitioners in this case, consisting of Oliver O. Clark, David D. Sallee, and myself, you made an appraisal of certain property in Palm Springs.

A. I did.

Q. What properties were they?

A. Those are the properties in the name of Lee Arenas, located in Sections 14 and 26, four acres, two acre parcels in Section 14, and 94 acres, more or less, in Section 26.

Q. I show you Petitioners' Exhibit No. 10. Can

(Testimony of Joseph A. Gallagher.)

you point out the relation between the property you specifically appraised at petitioners' request, and the property in question here today?

A. Yes. Lots 46 and 47, which are north of Lot 50, the Brown property. Lot 47 is contiguous. It is immediately adjacent and north and parallel to Lot 50, the Brown property.

In Section 26, I appraised 39 and 40, immediately north of the Brown Lot 41. Those were five-acre parcels.

Then there were some 10-acre parcels and some 20-acre parcels, and I believe a 40-acre parcel in there. Yes, there was a 40-acre parcel, which appears to be adjacent to and immediately west of the Brown 40-acre parcel.

Q. In making the appraisal that I am about to ask you [187] about here, for the Lee Arenas properties, we will call them, did you not also examine the Brown Arenas properties, the ones in question here?

A. Particularly, no, Judge, because I had no reason to examine that at that time, but I did examine the general area there, and I believe my inspection and survey work in 1947 somewhat covered the Brown property on account of the proximity of the Brown acreage.

Q. Do you know any distinctions between the properties and the ones you appraised?

A. I do not.

Q. As far as you know, they are exactly similar, are they not?

A. My answer would be yes.

(Testimony of Joseph A. Gallagher.)

Q. Please tell the court just what you did to prepare yourself for an evaluation of these properties.

Mr. Brett: May I ask a couple of questions on voir dire, your Honor, in view of the last answer?

The Court: You may.

Mr. Brett: The witness has said he did not examine these——

The Court: You may examine. Go ahead.

Voir Dire Examination

By Mr. Brett:

Q. Mr. Gallagher, your appraisal of the Lee Arenas [188] parcels was in 1947?

A. That is correct.

Q. Have you been back to the property since that date? A. I have not.

Q. Had you ever made any appraisal in the City of Palm Springs prior to the appraisal of the Lee Arenas properties?

A. I mentioned Dolores Hope, those three lots. I will say, Mr. Brett, that I was in Palm Springs with some of the appraisers for the U. S. Engineers, the Corps of Engineers, when some of those properties were acquired there.

Q. When some of the Government property was acquired?

A. That's right. I didn't appraise, but I was down there and I was consulted on some of those appraisals.

(Testimony of Joseph A. Gallagher.)

Q. That was in the period prior to 1945?

A. That is correct.

Q. In fact, it was approximately 1942?

A. Approximately 1942.

Q. But with the exception of appraising some three lots for Dolores Hope—when was that, with reference to 1947? Before or after?

A. That was before 1947. I should say about 1946. I believe I am correct there. It was either 1945 or 1946.

Q. Then, as I understand it, with the exception of the fact that you accompanied some government men who were appraising some land in 1942 in the Palm Springs area, and one visit [189] to Palm Springs to appraise some two or three lots for Dolores Hope in 1946, and the appraisal you made in 1947, you have had no further activity with reference to Palm Springs?

A. Except with the Big Inch gas line that came through the Palm Springs area, north of Palm Springs, however.

Q. How far north from Palm Springs, about?

A. I should say, if we use Ramon Road as a pivot point, and I had time, Mr. Brett—

Q. Isn't it approximately seven or eight miles?

A. I will give it to you. I want to get my directions, because I am trying to go back three years in memory now, with all the other appraisal jobs I had, and I don't want to make a mistake or give any misconception whatever. If you will kindly

(Testimony of Joseph A. Gallagher.)

bear with me, I will try to straighten myself out, as best I can.

I should say about eight to eight and one-half miles north, or eight to eight and one-half miles east. I got my direction somewhat wrong.

Q. Since this 1947 appraisal of the Lee Arenas property, you have not returned to that area to make an appraisal? A. That is correct.

Q. And you have not personally visited the site of any of these properties since 1947?

A. That is correct.

Mr. Brett: If the Court please, I respectfully submit [190] the witness is not qualified to express an opinion of value either in 1948 or 1950, whichever date is selected.

Mr. Preston: This report he made and appraisal he made bears the date of December 9, 1947. That is less than six months before the date we have here, the 18th day of May, 1948.

The Court: The court will state the objection may be overruled. That will go to the weight given to the witness' testimony. The objection is overruled. Go ahead.

Q. (By Mr. Preston): Go ahead with what you did to prepare yourself for the expression of an opinion as to the market value of these properties since 1947.

A. In 1947, I visited the Arenas properties and walked on the properties. That is on Section 14. I did not walk over the entire area, but I did walk in from Indian Avenue by these old buildings that

(Testimony of Joseph A. Gallagher.)

are on Section 14. I did the same thing in Section 26.

Then I drove east on Ramon Road to Sunrise, north on Sunrise—Sunrise is the easterly boundary line of Section 14. Then north, I believe, to Alejo, which is the northerly boundary line of Section 14. I drove around the section, looked at improvements in the sections close to Section 14, and to Section 26.

Then I went to the County Engineer at Riverside and secured a zoning map and a use map. I believe I got my use map from the county engineering department. [191]

I talked to the Water Engineer at Riverside. His name, I cannot remember now.

The Assessor's office at Riverside, we did considerable work in the Assessor's office, trying to ascertain what in their opinion the market value of property was in Section 14 and Section 26, and received considerable information from them.

Then the City Engineer at Palm Springs, and one of the banks, talked to the manager of one of the banks. I am awfully sorry I don't remember these names. I like to be so well prepared, but unfortunately I am not right now.

I did talk to the manager of one of the banks there. Talked to the Chamber of Commerce, the City Manager of Palm Springs. I talked to a great many people around Palm Springs.

I talked to brokers and to some property owners.

(Testimony of Joseph A. Gallagher.)

I believe at the time I talked to Mrs. McManus. I am not quite sure of that.

I visited some of the dude ranches to see what particular type of construction was on these dude ranches and how close the ranches were to the two sections that I am referring to.

I made a study of Palm Springs, the location of Palm Springs in relation to its distance from Los Angeles and from the border of Mexico and also from Indio, on different border lines, and found between Palm Springs and Indio there were several communities that had grown up just recently. [192] That would be south of both Section 14 and Section 26.

These communities were Cathedral City and Palm Village, and there were a couple of others in there.

I ascertained that Palm Springs was on the main line of the Southern Pacific Railroad and is serviced by the railroad and by Greyhound busses, Greyhound busses several times a day. The city is also serviced by transcontinental and local air lines.

The general geographic location of Palm Springs and climatic conditions, the rainy season, and whatever considerations an appraiser pays particular attention to.

I found that there are several, not only nationally, I believe, but internationally known places around the Palm Springs area. For instance, the Palm Canyon, which is noted for prehistoric Washington palms, or something of that nature. That

(Testimony of Joseph A. Gallagher.)

is six and a half miles south of Palm Springs. Andreas Canyon Road for the palisades, the palms, and old Indian caves. Chino Canyon for the water springs, and several other canyons.

That entertainment was furnished by some very well established places of entertainment. I have a list of them. The list is quite numerous.

That there are a great many hotels in Palm Springs. I ascertained the location of the hotels, the number of rooms, and the rates charged. [193]

For instance, the Ambassador Hotel—I won't go into all of them, because I have quite a list—the Ambassador Hotel at 640 Indian Avenue, the rates are \$40.00 double and \$22.50 for single, and there is a swimming pool——

The Court: Why is it necessary to go into those matters to show qualification? We will be here for a month if you keep on this way.

Q. (By Mr. Preston): What did you do about comparing values of property?

The Court: Why go into all those specific things?

Mr. Preston: No, I will not.

Q. What did you do with reference to examining other pieces of property?

A. I examined quite a few properties in order to establish comparability, to find out what the properties sold for, and in many instances I investigated the assessed value of those properties.

I did that for this reason. I have quite an assessed valuation schedule. I believe there are 66

(Testimony of Joseph A. Gallagher.)

of them. I realize that the assessed valuation doesn't represent market value. However, I believe that the offices of the county assessors in the State of California have a very fine idea of market value, and when they assess the property they assess at a certain percentage of market value. That belief of mine is supported by this fact—— [194]

Mr Brett: Just a minute.

Q. (By Mr. Preston): Perhaps that would be a little further than the question that I have put to you would warrant. Continue with the recital of the properties, if you will, if you haven't finished, that you examined with reference to values.

A. Well, I secured an idea of what properties sold for around Section 14 and also around Section 26.

Q. About how many properties do you think you examined in that respect?

A. Twenty-some-odd properties, Judge. I will have to say, however, that I was not out on all those 20 properties. I was on quite a few of them.

Q. Where did you get your information regarding the properties?

A. The title company in Riverside County, and also in the Recorder's office. I have the I.R.S. stamps on some of those sales, which in a way indicates what the property sold for.

Then, after ascertaining what properties in the general area of the Arenas properties had sold for, or were listed for, I tried to strike an average as to what in my opinion was the fair market value

(Testimony of Joseph A. Gallagher.)

of the two-acre parcels in Section 14 and the five and ten acres and forty acres in Section 26.

Q. Did you compile a written report in connection with [195] those services? A. I did.

Q. And it is on file in another division of this court, in the Lee Arenas case, now, is it not?

A. Yes, sir.

Q. Your report is as of what date?

A. I believe December 9, 1947.

Q. At that date you had an opinion, did you, and expressed it, as to the market value of each of these Lee Arenas parcels? A. I did.

Q. And what was the value of the two two-acre parcels in Section 14?

Mr. Brett: Of Lee Arenas?

Mr. Preston: Yes.

Mr. Brett: I object to that as irrelevant and immaterial.

Mr. Preston: That is adjoining property, and I am going to prove value. This is the same location.

The Court: Overruled. Go ahead.

The Witness: May I have the question, please?

(The question was read by the reporter.)

The Witness: \$20,000.00 an acre.

Q. (By Mr. Preston): That would be \$40,000.00 for each two acres?

A. That is correct. [196]

Q. And what would be your opinion as to the value of the two acres immediately south of these two lots you have just described?

(Testimony of Joseph A. Gallagher.)

A. \$20,000.00 an acre.

Q. In other words, they are, in your opinion, of the same value? A. That is correct.

Q. What opinion did you express with reference to the five-acre tracts belonging to Lee Arenas in Section 26? A. \$13,200.00 an acre.

Q. \$13,200.00 an acre? A. That is correct.

Q. And there were two of such lots, were there not? A. Yes.

Q. Two five-acre lots? A. Yes.

Q. There is what is known as the Brown property immediately south of those two five-acre lots. What would be your opinion of the value of that as of that date?

Mr. Brett: If the Court please, I am going to object to that because the witness said in the first place he hasn't examined it, and, in the second place, he hasn't said it is the same type and character.

Mr. Preston: It is the same type and character.

Q. What is your opinion? [197]

A. As I remember, Judge, it is the same type and character.

Q. The same thing, and it is immediately south of one of the five acres, is it not?

A. That is correct.

Q. And do you know of any difference in value between the one and the other? A. I do not.

Q. Your opinion would be, then, it was of the same value as each of the other five acres?

A. That is correct.

(Testimony of Joseph A. Gallagher.)

Q. Did you express an opinion at that time on the so-called two 40-acre tracts that belonged to Lee Arenas? A. \$9,500.00 an acre.

Q. Are you familiar with the location of the Brown property, Brown Arenas property, the one in suit here, the 40 acres?

A. In the same manner as with the two acres and the five acres. I believe it is typical property.

Q. You think the value would be the same per acre? A. I do.

Q. That would be \$9,500.00?

A. \$9,500.00 an acre.

Q. \$9,500.00 an acre. Are there any further reasons why you formed these opinions that you desire to state, any [198] of the reasons that prompted these values?

They seem to be going into that with other witnesses, and you may have that privilege, if you like.

A. I believe that more or less covers it, Judge, except as I made my study at that time in examining Section 11, which is immediately north of Section 14, and Section 10, which is northwest of Section 14, Section 15 immediately west, on examining the sections around Section 14 and also the two sections, 25 and 27, east of and west of Section 26, I tried to pay particular attention to the zoning in those sections, looking rather carefully at the zoning in Section 14 and also the zoning in Section 26.

Section 11, immediately north of 14, is built up with substantial structures and is zoned, for the

(Testimony of Joseph A. Gallagher.)

most part, R-1, which is somewhat different from R-1-A in Section 14.

There are quite a few small areas zoned C-2-R-4, R-4 hotel locations.

In other words, I looked at the zoning in sections around 14 and saw that the properties had been built up in a substantial manner. Namely, Section 11 north of 14 was built substantially; Section 23 south of 14 was being built substantially, as it was when Paul Trousdale went in there and bought more or less 150 acres and put on it 72 units.

I am satisfied in my mind that what prevailed north and what happened south must of necessity in time happen between [199] these two developments.

The same conditions on the sections east and west of 14, the same condition in Section 26.

So that was my analysis.

Q. What in your opinion is the highest use for which Section 14, the area in question here, is adapted?

A. Single-family residences for that property, that is, for the two acres, the two Brown acres we are talking about. It is zoned R-1-A, which allows single-family residences. They may be two stories in height, if necessary. That would develop rather attractively in single-family residences.

Then, with the securing of additional acreage there, it could develop into a rather attractive development unit with residential income units and

(Testimony of Joseph A. Gallagher.)

with some business property, some business sites established on the development, the same as we have in all these tracts in Southern California, or most of the tracts in Southern California.

I personally would like to see it develop under its present zoning of R-1-A, with a little business area located somewhere in the general area of this property, and that could be done.

Then, in Section 26, where the five acres are and the 40 acres, that is zoned R-1, and it is also zoned T for trailer park. There are quite a few trailer parks in Palm Springs and they are making [200] money.

I would like to see the five acres and the 40 acres, with additional acreage, developed into a nice residential area.

I don't think I am mentally exaggerating what my analysis is, because several miles east there are a few tracts right in the wind belt and where the sandstorms are excessive. Those tracts have been sold out, and if they can develop a few miles east without anything around it, I can't see why they can't develop this.

Trousdale sold his out without any trouble.

Q. Do you have any further reasons for your opinion?

A. I believe that just about encompasses what I had in mind.

Mr. Preston: Cross-examine.

Mr. Brett: Your Honor, could you take about

(Testimony of Joseph A. Gallagher.)

a three-minute recess? I think I can save time on my cross-examination, if you will.

The Court: We will recess for ten minutes.

(Short recess.)

Mr. Brett: Your Honor, I am going to take just a minute. I want to explain why I want to go over his former work.

The Court: Is this cross-examination now?

Mr. Brett: Yes.

The Court: Go ahead.

Cross-Examination

By Mr. Brett:

Q. Mr. Gallagher, you testified at some length as to [201] your previous activities. Your activity in connection with the acquisition of a right of way in the Boulder Dam area was over in the State of Arizona, is that correct?

A. Nevada and California.

Q. Nevada and California? A. Yes.

Q. Approximately how far from Palm Springs?

Mr. Preston: What point?

Mr. Brett: Any point.

The Witness: Let's say starting at Boulder Dam?

Q. (By Mr. Brett): Yes.

A. Mr. Brett, you asked me those questions before and I gave you my answers then. At that time I was well prepared. My distances are in that report. I should say Las Vegas is about—don't hold

(Testimony of Joseph A. Gallagher.)

me too tight to these distances—Las Vegas is about 250 miles from Los Angeles, and Palm Springs about 109 miles from Los Angeles. Maybe between 200 and 275 miles away, that is, Las Vegas itself.

San Bernardino, we came through San Bernardino, through the hills at San Bernardino, and as we worked into Los Angeles——

Q. What is the nearest point to Palm Springs in that activity?

A. I should say San Bernardino.

Q. That would be about how far? Well, do you know whether it is better than 80 miles? Isn't it? [202]

A. I don't know.

Q. And that activity was for the purpose of acquiring a right of way? A. That is correct.

Q. Not any fee property, but a right of way on property? A. That is correct.

Q. You stated you had some activity for the U. S. Treasury office, the San Francisco office of the United States Treasury, at Pismo Beach. That is in San Luis Obispo County?

A. That is correct.

Q. And it was approximately how far from Palm Springs?

Mr. Preston: Objected to as immaterial.

The Court: Overruled. You have gone into these matters.

Q. (By Mr. Brett): Isn't that at least 250 miles from Palm Springs?

A. Yes, I would answer to that.

Q. Then you stated you had some activities in

(Testimony of Joseph A. Gallagher.)

connection with various dams, the Matilija Dam and the Casitas Dam in Ventura County?

A. Yes, sir.

Q. Ventura County is north of Los Angeles County? A. About 65 miles.

Q. And that is approximately 125 to 150 miles from Palm Springs, is it not? [203]

A. Approximately.

Q. Your Ventura River levee would also be at least that distance from Palm Springs?

A. That is correct.

Q. Then you stated you had some employment in connection with the widening of Foothill Boulevard. Foothill Boulevard is a boulevard that runs in both Los Angeles County and San Bernardino County? A. Yes.

Q. Where was your activity?

A. In Pasadena.

Q. That would be how far from Palm Springs?

A. I would say 100 miles, more or less.

Q. That was the acquisition of a right of way?

A. No—yes, more or less. It was the widening of Foothill Boulevard. That is correct.

Q. Now, then, you stated you had some employment for the Associated Oil Company at Gavota Pass in Santa Barbara County. That is in the northern part of Santa Barbara County, isn't it?

A. It is between Pismo Beach and Santa Barbara. It is about 35 miles north of Santa Barbara.

Q. And that is about—

A. 109 miles, about the same distance from Los

(Testimony of Joseph A. Gallagher.)

Angeles that Palm Springs is from Los [204] Angeles.

Q. In other words, it is over 200 miles from Palm Springs? A. That is correct.

Q. You stated you had some work in connection with some pipe line commencing at the Colorado River east of Blythe. Blythe is right on the Colorado River at the east boundary of the south part of California? A. That is correct.

Q. It would be about how far from Palm Springs?

A. Well, oh, I should say about 175 to 200 miles.

Q. That was for a pipe line right of way?

A. That was the Big Inch gas line.

Q. To bury a pipe in the ground?

A. That is correct.

Q. You said that you were employed in connection with the transmission line along the San Gabriel River. That is in Los Angeles County just a few miles from this court house?

A. Yes, sir.

Q. That is about how far from Palm Springs?

A. About 100 miles.

Q. You also stated you were employed in connection with some slum-clearance project. As I understand, you have just started upon this work?

A. No. We have been on Rose Hill.

Q. And Rose Hill is not very far from this court house? [205] A. No.

Q. How far?

A. About three miles, three or four miles.

(Testimony of Joseph A. Gallagher.)

Q. How far from Palm Springs?

A. About 105 miles.

Q. And both Rose Hill and Aliso-Pico you referred to are right in the heart of Los Angeles City?

A. That is correct.

Q. You stated you did go to Palm Springs at one time in behalf of Dolores Hope, and I understand she is the wife of Bop Hope, the movie and radio actor?

A. Yes, sir.

Q. Did you go there as her agent, merely to indicate to her what she should or should not buy?

A. Dolores was interested in buying some property in Palm Springs, and before she bought she wanted to know whether or not the location she had in mind was the correct location, and asked me if I would go down and see if I could find something for her, which I did.

I talked to Culver Nichols and I asked Culver to pick up a couple lots for Mrs. Hope in a location which in his opinion would have a future valuation, a location where the property values were increasing, and one of the brokers in his office—I can't remember his name—was the one who found the three lots and told me what the price was, and I [206] recommended to Mrs. Hope that she should buy those lots.

Q. That was your activity in that regard?

A. That is correct.

Q. You stated in making your appraisal of these properties you were relying upon the appraisal that

(Testimony of Joseph A. Gallagher.)

you made of the contiguous properties in the Lee Arenas case? A. Yes, sir.

Q. And you had fixed a value in 1947 for the Lee Arenas separate units, and you fixed your valuation of these based upon that valuation?

A. That is correct.

Q. And under the method that you used in that particular appraisal? A. That is correct.

Q. First, let me ask you this: Do you know and can you state under oath today whether or not the two-acre parcel of Della Brown has a wash across it?

A. Would you mind repeating the question? Give me one at a time.

(The question was read by the reporter.)

The Witness: May I have it as, "Do you know whether there is a wash?" I am confused with the other there, the "Do you know and can you state under oath."

Q. (By Mr. Brett): Oh, I see. Do you know whether it has a wash across it? [207]

A. I do not.

Q. You mean you don't know one way or another?

A. I do not. May I explain my answer, your Honor?

The Court: You have answered. You said you do not know. Don't keep going on with this argument between witness and counsel. We will never get through with this lawsuit. Just answer the

(Testimony of Joseph A. Gallagher.)

question, and if they don't like the answer, they can ask you another question.

Mr. Brett: Your Honor, I am not arguing with the witness.

The Court: Go ahead.

Q. (By Mr. Brett): Do you know whether there is a wash across the five-acre parcel?

A. I don't think there is a wash across the five-acre parcel. I think there is a sort of a surface drainage in there, a surface wash condition, just on the surface. It is not a big wash like that wash that goes across the Trousdale property, which is 200 feet wide. I think it is just a general topographical wash condition across the five acres.

Q. Is it your recollection that there is any such wash across the Lee Arenas five-acre parcel?

A. No, sir.

Q. You stated as a part of your preparation you contacted the County Assessor at Riverside?

A. That is correct.

Q. Riverside is the county seat of the county in which [208] Palm Springs is located?

A. That is correct.

Q. Was the County Assessor in Riverside able to give you any information as to assessed values in either of these two sections that were a part of the Indian reservation, Section 14, in which the two-acre parcel lay, or Section 26, in which the five- and forty-acre parcels lay?

A. I received no information as to assessed values of properties in Section 14 and Section 26.

(Testimony of Joseph A. Gallagher.)

Information on assessed values was on properties on the surrounding sections.

Q. You received information that those particular properties were not assessed for taxation?

A. That is correct.

Q. You stated you did get the assessed values of properties which surrounded Section 14 in all four directions?

A. Yes, sir.

Q. To the north was Section 11?

A. That is correct.

Q. To the west was Section 15?

A. That is correct.

Q. To the east was Section—what was the number there?

A. 13.

Q. Sir?

A. 13.

Q. 13. And to the south was Section 23? [209]

A. Section 23 to the south, that is right.

Q. First you found that all four of those sections were not Indian reservations, but were white-owned sections?

A. Yes, sir.

Q. Section 11 was highly developed with one of the principal hotels in Palm Springs, the El Mirador, and with many homes of wealthy people, is that not correct?

A. That is correct.

Q. Section 15 was developed with the principal motel in Palm Springs, the Desert Inn, and you found it was assessed at a valuation of \$900,000.00, didn't you?

A. The Desert Inn property?

Q. Yes.

A. I don't remember whether or not I even

(Testimony of Joseph A. Gallagher.)

checked the assessed valuation of the Desert Inn property.

Q. You found it also had the principal business thoroughfare in Palm Springs, Palm Canyon Drive, Section 15? A. That is correct.

Q. And that it contained many business properties and many homes of wealthy people?

A. That is correct.

Q. Section 23 contained the Biltmore Hotel property, one of the finest hotels in the area, at the south end and along the state highway?

A. That is correct. [210]

Q. And contained the Deep Well Ranch, another extensive development? A. That is correct.

Q. And it contained other developments of a high-class character? A. Yes, sir.

Q. And Section 14 contained the race track and an amusement area, as well as the airport?

Q. Yes, and there were some subdivision lands in Section 13 from Alejo Road to McCallum Way, and south of McCallum Way to Baristo Road.

Q. Is it not true, also, Mr. Gallagher, you took the assessed values irrespective of whether the particular piece was or was not improved, and you came to what you deemed to be an appropriate and proper total of the assessed value of 11 at so many dollars as the assessed value of that entire section?

A. We are considering the vacant land, aren't we, Mr. Brett? I did not give any weight whatsoever to the assessed value of the improved property.

(Testimony of Joseph A. Gallagher.)

Q. You took assessed value of vacant land in that section? A. Yes.

Q. Which was improved with many fine homes?

A. That is correct. [211]

Q. You took the value of 15, which included the business district? A. That is correct.

Q. And you took the assessed value of 13, which included the airport and the race track area?

A. That is correct.

Q. And you took the assessed value of 23, which included the fine hotel, the Deep Well Ranch, and other properties?

A. That is correct, plus—Pardon me.

Q. Go ahead.

A. All right. Plus some sales and also some listings.

Q. In other words, you get your figures both from assessments and from some listings and some sales, and arrived at a general value, in your opinion, of these four sections?

A. That is correct.

Q. Then you added the four sections together and you came to a total, didn't you? A. Yes.

Q. Then you divided by four?

A. That is correct.

Q. And then you determined that Section 14 had 640 acres in it? A. Yes, sir.

Q. And you determined, in your opinion, because Section 14 was in part being used by what you considered not an [212] advantageous use, shacks, and so forth—you learned that, didn't you?

(Testimony of Joseph A. Gallagher.)

A. Yes.

Q. You depreciated Section 14 to a certain percentage because it had shacks on it?

A. That's right.

Q. And then you took this X, divided by four, and divided that by 640, and arrived at the average value per acre, didn't you?

A. Ultimately, and may I answer—

Q. That is what you did, isn't it? A. Yes.

Q. Now, Mr. Gallagher, you had also to evaluate Section 26, didn't you? A. Yes, sir.

Q. 26 had the 25- and 40-acre parcels?

A. Yes.

Q. Section 26 had Section 23 above and to the north? A. Yes, sir.

Q. And had a section to the east of it, that was 27? A. 25.

Q. 25. It had a section to the west of it, that was 27? A. Yes, sir.

Q. Was there any section below it?

A. There was. I don't have the number of that section [213] below it.

Q. There was a section here we will mark "X" below. You did precisely the same thing in reference to the properties in 26? A. That is true.

Q. Determined in your opinion what the average value of the four surrounding sections was per acre, by first fixing the—based upon assessed values, some sales and some listings, you formed your opinion of the value of that whole section?

A. That is correct.

(Testimony of Joseph A. Gallagher.)

Q. And then you added the four sections together and divided by four?

A. In this instance, three.

Q. You disregarded this one? A. Yes, sir.

Q. You divided by three and you came to an average acreage value? A. Yes, sir.

Q. You didn't depreciate this property because you didn't consider it had the disadvantageous use, so by dividing by three, you then divided by 640, and came to an acreage value, didn't you?

A. Yes, sir.

Mr. Brett: That's all. [214]

Redirect Examination

By Mr. Preston:

Q. Is that all the factors that entered into the proposition?

A. I mentioned, Judge, I had considered some sales in that area there, what property sold for in those sections, and what property was listed for. Not only the assessed valuations, but also I combined the assessed valuations with listings and also sales, and the balance was—I was satisfied in my mind that I was correct and I was correct in my approach.

Q. You checked your computations?

A. I did.

Mr. Preston: That's all.

Mr. Brett: That's all. Thank you.

(Witness excused.)

Mr. Preston: That is our case. [215]

Mr. Brett: Your Honor, I would like at this time in behalf of the Government and the Indian to read into the record part of the opinion of the Honorable William C. Mathes in Case 1321-O'C, which is the Lee Arenas case, and which appears in the record in this case as a part of the Plaintiff's reply brief filed on April 13, 1948.

This has reference, your Honor, to the question which you ultimately have to decide on, whether or not the 1940 contract was void or valid, and also whether or not, by virtue of that fact, it tied in Eleuteria Brown Arenas, so that she also has to pay the fees for what Lee Arenas did.

Mr. Preston: This is part of my brief here.

Mr. Brett: Yes.

Mr. Preston: Why do you want to read my brief in the case?

Mr. Brett: Because I want to get it in the record.

Mr. Preston: It is not a part of the case. It is a good argument.

Mr. Brett: It is a transcript of the opinion of the Honorable William C. Mathes in 1321-O'C.

Mr. Preston: I object to reading the opinion, because it is not proper. It is hearsay. We would have to have the judge in here and talk to him, cross-examine him about it maybe.

Mr. Brett: This is an official opinion filed by a judge of this court in that case. [215a]

Mr. Preston: It doesn't make any difference. It isn't evidence.

Mr. Brett: Of course, I don't want to offend, unless your Honor rules. I want to offer it in evidence and read it. I will say for the benefit of your Honor, so you can determine what I am trying to get at——

The Court: If it is an official opinion, why shouldn't the court take judicial notice of it?

Mr. Preston: It would be good reading in chambers.

The Court: I have enough of that in chambers. I don't want any more than I have to have. But, anyhow, I will take judicial notice of that. The court should, I think. These two cases in some way are connected.

Mr. Brett: Then, if the court please, I will offer it by reference.

The Court: It will be admitted.

Mr. Brett: I particularly direct the court's attention to that part in which the court expressly holds that that contract was void. That is what I am offering it for.

Mr. Preston: The court held that the attorneys were bound by the contract. It is void as against the government, perhaps, but binding upon them.

The Court: Will you proceed?

Mr. Brett: Miss Singer, will you take the stand, please? [215b]

RITA SINGER

called as a witness by and on behalf of the respondents in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Rita Singer.

Direct Examination

By Mr. Brett:

Q. What is your profession, Miss Singer?

A. I am a lawyer.

Q. In what states are you admitted?

A. In the State of Michigan and the federal courts.

Q. Will you speak up as loudly as you can, because Judge Preston has difficulty in hearing and so do I?

Mr. Preston: I did not get the state.

The Witness: Michigan.

Q. (By Mr. Brett): By whom are you employed?

A. I am employed by the Department of the Interior, in the Bureau of Indian Affairs.

Q. For how long have you been in that employment?

A. I have been in the Department of the Interior since 1944 and have been working for the Bureau of Indian Affairs for the last three years, since 1947.

Q. What is your particular employment at the present time? In what office are you located? [215c]

A. I am now the Aera Counsel for the State of

(Testimony of Rita Singer.)

California, which is an area of the field office of the Bureau of Indian Affairs, and I am also the counsel for the Carson Indian Agency, which covers most of Nevada.

Q. Under your particular field of activity is the Palm Springs Reservation?

A. Yes, it is.

Q. In connection with such work and activities, has it been necessary for you to investigate the law and to form opinions and render opinions as to Indian law respecting these reservations?

A. Yes, of course.

Q. And with reference to trust patent allotments or allotments for trust patent?

A. Certainly.

Q. And allotments, both tribal and in severalty?

A. Well, there aren't any allotments tribally. Do you mean trust patents?

Q. Yes. A. Yes, of course.

Q. Have you also, as a part of your activity, been required to and have you come into information as to whether or not there have been any transfers of the rights of the Indians, which we term the allotment, under a trust patent in severalty?

A. Would you read that question to me again, please? [215d]

(The question referred to was read by the reporter.)

Mr. Preston: Your Honor, I have no objection

(Testimony of Rita Singer.)

to introductory questions, but I can't see the materiality of where this subject is leading. If it is a matter of what the law is, some of the rest of us might have an opinion about that.

Mr. Brett: Your Honor, the question is a little awkward and I will revise it, but it is leading to this. I believe I will be able to show by this witness, in addition to the legal presumption, that we have to show the thing could be sold, that this particular entity or trust patent under the law can be sold and has been sold from time to time. In other words, that it is a marketable product.

Mr. Preston: What is a marketable product?

Mr. Brett: A trust patent right.

The Court: Go ahead.

Mr. Brett: I did not make my question clear.

Q. Do you have knowledge of instances in which the trust patent rights of an Indian for an allotment in severalty have been transferred as such?

A. Yes. There are transfers both to Indians, to non-Indians, and to groups of Indians, that is, tribes of Indians.

Mr. Preston: Just a minute. To which we object unless it is cited it is with the consent of the Secretary of the Interior or his representative.

Q. (By Mr. Brett): Was it with the consent of the Secretary? [215e]

A. It was with the consent of the Secretary or his authorized representative, either the Commissioner or the Area Director, whoever had the authority to approve.

(Testimony of Rita Singer.)

Mr. Preston: Then I object to it as being immaterial. Certainly they can sell it with the consent of the Secretary of Interior or his authorized agent.

The Court: Well, if you agree on that, the answer can stand. Overruled.

Mr. Preston: I don't contend she can't sell it with his consent.

Q. (By Mr. Brett): Have you prepared a definition of an allotment based upon your research and your experience in this particular field?

Mr. Preston: To which we object, that her preparation of a legal opinion would not be of value to the court.

The Court: Sustained.

Mr. Brett: I don't know. I realize it is not binding on the court, but we have an expert here.

The Court: Sustained. There is no use introducing anything that is not binding on the court.

Mr. Brett: That's all.

Mr. Preston: That's all. Thank you.

The Court: You may be excused.

(Witness excused.) [215f]

The Court: We will recess until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock.) [215g]

Wednesday, November 29, 1950. 2:00 P.M.

The Court: You may proceed.

Mr. Brett: Your Honor, the Government and the Indian are ready to rest, with the exception that I would like to make certain motions to strike.

The Court: Make them now.

Mr. Brett: If this is the proper time, I will make them now.

The Court: I said I want to close this case sometime.

Mr. Brett: First, so that the record may have a motion in our behalf in the event that your Honor makes a determination, after considering the case, that the proper measure to be determined as the antecedent for the fixing of the fees is the value of the Indian's interest, and that the value of the Indian's interest is the value of her interest in the trust patent, then I move to strike the testimony in the record other than the testimony on value as to the Indian's interest and other than the testimony with respect to the value of attorneys' fees which, of course, are not contingent on that.

Secondly, if the court determines, after considering the evidence, that the 1940 contract between David D. Sallee individually and Lee Arenas does not entitle these three petitioners to receive compensation in this particular case for the work performed under that contract and in behalf of [216] Lee Arenas in Case 1321-O'C, or, in the alternative, if the court determines for other reasons, and particularly for those stated in your original opinion in this case, that they have been or are going to be

compensated in a separate proceeding for those very services and are therefore not entitled to receive compensation in this case for that part of the services which were delineated in the hypothetical question put to the lawyer witness, Mr. Martineau, which referred to their work, efforts, and all other matters with reference to their activities in the Lee Arenas case, 1321-O'C, then I move to strike the opinion expressed by the witness Martineau upon the ground that it is an opinion expressed upon a hypothetical question which included incompetent and irrelevant matters.

Third, I move at this time to strike the opinions expressed—not the rest of his testimony, but the opinions expressed—by the witness Benton Beckley, on the grounds, first, that he expressly admitted that he used assessed values as a part of such opinion and as an integral part thereof, and he expressly admittted he evaluated the market value upon the basis of conditions which were to be changed and as of the time of that change, that is, when the changes had been completed, as distinguished from the present existing conditions, and that, having considered both of those matters as integral portions of the basis upon which he expressed the [217] opinion, that the opinion itself must fall.

Lastly, I move to strike the opinions of value only as stated by the witness Joseph Gallagher upon the grounds, first, that he expressly admitted that an integral part of his testimony was the use of as-

sessed values, upon which he predicated his ultimate value.

Secondly, that he expressly admitted that his determination was made by an incompetent method, to wit, by taking the gross values estimated of other sections, by adding them together, by dividing them by the number of sections, and then by in turn dividing that cost by the number of acres in the particular section in which he was evaluating the property, which was an incompetent method of arriving at value, and since he expressly stated both of those matters were integral parts of and in fact the substance of the final opinion expressed, that the opinion is improper and should fall.

Now, with your Honor's permission, in order not to take time, I would like to supply my memorandum in support of those motions as a part of the brief which we will file with your Honor.

The Court: The court will reserve ruling upon your motions until the case has been finally submitted and considered and there is a final conclusion of the court.

We will get down now to the gist of the court's conclusions in this case. As I understand the mandate of the [218] Circuit Court of Appeals in sending this case back, I am to determine by fixing a definite amount in money to be paid, if any, to the petitioning attorneys. In other words, they concluded that this proceeding should hear and determine a definite amount to be paid to counsel, the petitioners here, in money. Otherwise, they said they affirmed the decision of this court in all re-

spects, except as to one item of cost, something between \$15.00 and \$100.00. Those are the reasons they sent this case back to me.

I want to consider and see whether or not the court understands the Circuit Court of Appeals in sending it back, not to reverse the court in allowing attorneys' fees in some amount or other, but directing this court to fix the amount in money.

That would involve, of course, it may be, the value of the property and the amount of the services rendered by counsel, the petitioners. I am not passing on that now, but I say those circumstances appear under this record of the Circuit Court of Appeals in this particular case. That is what I want you to bring out, both sides, and I would like for you to inform me what you contend is the value of each of these parcels, the two acres, the five acres, and the 40 acres, I want you to say what you contend is the value in your briefs. If you do that, it will help me.

I just suggest to counsel that those thoughts run around [219] my mind.

Mr. Brett: Yes, sir.

Mr. Preston: It is your Honor's idea that this matter be submitted on briefs?

The Court: You may do that or you may argue now, but I want it finally on briefs.

Mr. Preston: I want to make a few statements.

The Court: You may go ahead now, if you want.

Mr. Preston: I don't want to trespass on the court's patience, or time, either, but this is a case in which the speaker before you now, your Honor,

occupies a double position, one of attorney and one of personal interest.

That prompts me to state to this court that myself and my associates, the other petitioners, do not want any unfair advantage of the Indian in this case. We have served without compensation for these ten years, seven on my part and ten on their part. That is in the kindred and this case together. We have been paid nothing. We are even out expenses to some extent.

All we want is the fair judgment of this court, which we know we will get, and when we get that we will be satisfied.

I stated in the early part of this trial that in my opinion the Government never had the least idea of allowing its ward's property to be sold for its own dereliction. Every court that any branch of this litigation has been in [220] has condemned the action of the Bureau of Indian Affairs in its conduct of matters connected with this allotment proceeding. Therefore, I figure and feel, although I have nothing but my so-called hunch, that they do not intend for a moment to permit this property to go to the auction block. If they shouldn't, and I am confident of that, if they have the slightest concern for the welfare of the Indians, that they will not permit it, that is another reason why I want the court to be reasonable, and if there is any error, err against us rather than the Indian and the United States.

This opinion of the Court of Appeals is a little puzzling as to what the duties of the court are here.

It says that, as a factor in assessing our fees, you should consider and determine, that is in the opinion, the value of these properties. But in the judgment and in the mandate, the word "determine" is not used with reference to values. It is used with reference to the amount of attorneys' fees, but it is not used with reference to the amount of the value of this property.

I may be wrong, but I feel that all you need to do is to find an approximate value or a value beyond which it should not go and a minimum value beyond which it should not drop. I believe that would satisfy the ruling of the court. I may be in error on that, and undoubtedly this court will give very careful consideration to what its duty is in [221] that connection.

I remember Judge Mathes several times during the trial of the Lee Arenas case uttered a similar sentiment to that which I have just expressed.

When you come to the value of this property, I believe, as I have argued it to this court during the trial of this case, that it is the value to the Indian, that the market value is only used as an indicator of what to arrive at as the actual value to the Indian. Of course, that is offhand and that is not after any particular study of the authorities, but that is my view of it.

The Indian's title is a subject that your Honor is familiar with, I know. I have written a new brief on it, and I have sent for it to come up here during this proceeding, if it gets here in time. But I don't think we need to stop to dwell too long on

that, because it is in the opinion in 181 Federal 2d, at page 62, the Lee Arenas opinion. There is foot-noted practically every case that undertakes to discuss and to define the Indian's interest. I have added to that *Chapman v. Schrap* [*Choate v. Trapp*],* which holds that the Indian's allotment is a vested interest and is protected by the Fifth Amendment.

So I say that the Indian's title in this case is a full and equitable title, and the United States is a guardian with no interest in the property, no proprietary right or estate in it, with no conflict of duties between any other function [222] of the Government and the Indian, but confined solely to what is the best interest of the Indian, she being a member of a dependent people.

That is even stated in the opinion in this very case, that the sole duty of the Government is to protect the Indian, and these restrictions that have been talked about here in this case are presumably for the benefit of the Indian and are to be exercised when, as, and if it is deemed by the guardian in good faith to be for his best interest.

So that by the nature of his title, this proposition of the market value of his title conveyed to an outsider, with the consent of the Government, is an absolute absurdity on its face. It couldn't be, because if the Indian transfers all the title he has, and the Government consents to it, the full title

*[*Choate v. Trapp* appears in pencil longhand over *Chapman v. Schrap* on original.]

has passed to the purchaser, and the restrictions about leases and contracts are forever gone, because they are subordinate to and contained within the compass of the legal title.

So when you put a witness on the stand and ask him what is the fair market value of the Indian's interest on the basis of making a sale of that type, I say you have accomplished nothing. It is a fraud on its face. It is *felo de se*. Where I come from the argument destroys itself. I take it the court will have no trouble whatever in deciding that item as any measure of value in this case. [223]

Now, the measure of value, therefore, left is the opinion of one set of witnesses against the other, and what is the cause of the difference in opinion? The cause of the difference of opinion, in my belief, your Honor, is simply this: That the Government's two experts, Evans and Jones, have declined to consider anything further than the present plight of these lands, weighed down by these shackles that are on there, which are put there under Government permit, tribal permits O.K.'d by the Government, I should say, to be more exact. Such values based on the present surroundings, the present development, and the present income, are a travesty on the rules of market value.

Market value is supposed to be based on all the potentialities of the property, and you have seen that by the location of this property, by the surroundings to the west and to the north and to the south, that this is the road of expansion of the business area of Palm Springs. Any witness who

refuses and fails to take that fact into consideration has expressed an opinion based on omitting material elements that should have engaged his attention. That is the reason for the difference of opinion.

The opinion of Mr. Beckley as a realtor and broker down there, a property owner, is based upon the theory Palm Springs is backed up against the San Jacinto Mountains on the west and must go over and traverse these properties to expand [224] at all. Upon that expansion, of necessity they have fixed the market values of these properties, and I think they are sound. They are the market values. Whether they are too much or not is a question the court will have to wrestle with.

I feel personally it is the only way you can get at it, but I also feel it is not in itself an exact way of doing it. I have to be frank to any court in my own conscience, in saying that, that I don't think the market value is anything but the surface guide.

I say that for this reason, your Honor. The Indian, with his property in the hands of an honest guardian, acting solely for his interest, would permit a sale of the property if it was to the best interest of the Indian to do so. If it is not to the best interest of the Indian to do so, and the Indian is required to keep his property, in my judgment it must be held that the property that is kept would be of equal value to these property prices if it were sold. That is my argument. I haven't borrowed it from anyone else. It is only a generation of my small intellect. But that is the way it looks to me,

that the market value is the equivalent of the value to the Indian of his allotment.

These restrictions we discussed here and that were put in the hypothetical question are restrictions to be used only where the Indian is not able to care for himself and is practically in the state of a minor or an incompetent person. [225] Where the Indian is competent, it is the duty of the Government not to exercise any of these restrictions, unless such as provided by law, and, of course, he couldn't override them, but it is the duty of the Government as guardian to give consent to a fee patent, for example, if the Indian is prepared to take it.

That the Indian is prepared to take the allotment has been determined in this case, and it is also determined by a statute in 1917, when this Bureau was directed specifically to begin the making of allotments which have not yet been completed in this case.

So we have the proposition that the property in the hands of the Indian is presumably worth just as much as if it was in the hands of any other trustee, and as if the Indian were a white man with the intellect of an average human being, and some of these Indians meet that full standard, in my opinion.

With that preliminary, your Honor, I haven't much to add to this. I can't resolve the question as to how much.

All I am asking you to do is, when you come to the fees of Preston and Salee and Clark, to give

the consideration that you would give to any other problem and give them the reasonable amount that you think is just, and let us have all errors, if any, in favor of the Indian, err against us rather than against the Indian. [226]

This question of striking these things out here, I don't think I need to discuss that here. The witness Martineau, however, said that his opinion of value would be just the same as if the Lee Arenas case had not been taken, but if some third person, some third lawyer, who had not been in the Lee Arenas case, had prepared this case, that the fee he gave here would be the fee he would give a lawyer, and we had a right to use our knowledge and our skill, whatever we have, gained from whatever source, in the conduct of these proceedings here before you, and he never asked you to double-pay us in any sense of the word. He disclaimed any such intention or purpose to do so.

With those remarks, your Honor, I shall have to tell you there are five or six different elements that enter into the fixation of a lawyer's fee. They are set up in the brief I filed before you already, and you will have to either make an approximation or a full determination of what the value of the Indian's interest is in this allotment.

The Court: You set that up in your brief as to what the evidence shows.

Mr. Preston: I will do that, your Honor.

The Court: I would like to get the views of counsel on both sides as to what this evidence

shows, what is the value of each one of these three tracts here.

Mr. Preston: You asked me that, and I haven't given you [227] too much light yet.

The Court: I am going to give you both time to file final briefs.

Mr. Preston: I can say only that the market value of the fee title is the best guide to what the value is to the Indian.

The Court: We have got two lines of evidence here.

Mr. Preston: And I can't resolve a conflict like that. I have only pointed out to you that one is based on the status quo, demoralized, debased value, due to the fact that the Indians have had no title and couldn't make one, and they have allowed a lot of slum shacks to go up on the property, and the Government witnesses want to value it in that condition, and I say that is not the test. Therefore, I regard those values as not on the proper basis. They haven't included the items that should be contained in their opinion.

As for ours, it may be bigger than you think it ought to be, but I think it is the nearest thing to it we can get.

Mr. Brett: Your Honor, I also want to supplement my remarks with a brief, but both to assist Judge Preston in his brief and to indicate to the court briefly the Government's and the Indian's position, I will take a few moments.

First, we have this proceeding based on a mandate of the Court of Appeals. I, too, agree that,

in addition to not being satisfied with some of the decision which is now final, [228] I have some difficulty in interpreting the mandate. However, the best interpretation I can give, and which I expect to enlarge upon, is this:

I feel that we can assume that the Court of Appeals at least read the record. If the Court of Appeals read the record which has been introduced in this proceeding as Exhibit 8, the Court of Appeals definitely had before it the fact that this court heretofore had had presented to it two types of evaluations, and at that time you stated you had some difficulty in determining what to do about them. Like you, I am also guided by what the Court of Appeals ended up with.

You avoided that and determined it on a percentage basis, which did not require you at all to determine market value. In other words, you allowed a percentage of whatever might be the value of the lands. That, of course, is now out, because the Court of Appeals has rejected it.

I say the Court of Appeals will be deemed to have known that, because it is a part of the record. In the light of that, it is my interpretation that when they send it back and say that this court should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted lands under the trust patent, it seems to me that they point out that the thing to be evaluated is that interest, in other words, the trust patent interest. [229]

Therefore, it would be the Government's position, not the Indian doesn't have a vested right—we have conceded that—but that the nature and character of the vested right is that of a trust patent, and that has certain limitations which affect value. In other words, that is what the attorneys have recovered for the client, and it will be our contention on the matter of a reasonable value on a quantum meruit contract, that is the most that the attorneys can have.

May I say parenthetically, I recognize, in fact, I think I have had one or two cases in my own practice as a private lawyer before I worked for the Government, and I recognize it not only is lawful, but there are occasions when an attorney may both earn and can have a fee which will be in excess of the intrinsic marketable value of what he recovers for the client. There are certain times a client wants to establish a principle, something of that kind. But it is my view, and I will endeavor to support it in the brief, that such a matter is not one you can consider under a quantum meruit contract.

In other words, I think the quantum meruit contract has to be based and limited at its topmost by what you recover for your client.

The next thing that I believe the mandate of the Court of Appeals has stated is that after you fix that as a factor, then, in the light of that value of that which the lawyers [230] have achieved for the client, and applying all of the principles of fixing the value of a lawyer's service, you then fix what

in your view is the reasonable value of the services they performed for the client.

Here I will say to you I believe, and I shall expect to urge in my brief, that it certainly should not be the equivalent of what they recovered for the client. Or, putting it another way, I don't think the fee allowed the attorneys should be the equivalent of everything the Indian got, so that the Indian wouldn't have anything left.

As to that measure, I believe that the memorandum Judge Preston filed with you recites a case that gives some six points, subject to review, because I got them on the run, but that comports pretty closely with my understanding of the various factors the court may properly consider. I realize, and I think Judge Preston would agree, that primarily is in the breast of the court, because of all the people we might produce who would have any basis of determining the reasonable value, I think your Honor would be best equipped, because in the main a judge will determine more cases and pass upon the efforts of more attorneys than any one lawyer will in his career. So that we decided not to put any expert testimony in by any lawyer. We believe your Honor can make that decision in a very fair way.

In that connection, however, we shall urge this. First, [231] I do not believe that any part of the work that was done in a separate case under a separate written contract, which does not in any sense include this Indian that is here the plaintiff and now the respondent, which does not name her

either directly or indirectly, should be considered as a part of the services rendered in this case.

Secondly, and I say it in all sincerity, your Honor, I hope to convince your Honor when you have had a chance to give further consideration to the record in this case, that contrary to Mr. Martineau's statement, the law is so well fixed finally and firmly as to the right of a member of the Palm Springs Band of Mission Indians to get a trust patent, that you didn't have to have somebody steeped and groomed in Indian law to decide that question; that any tyro who would have the ability to analyze law and to make research could have found that factor in a day's time.

I do realize, and I want this clearly understood, I realize that some of the questions that arose on this supplementary procedure, which have astounded me but have now been made the law and have supported your Honor, and you know how I fought it—I did not believe any final court would state in the face of existing law you could put a lien on the allotment. In that work, they have accomplished an astounding thing, and an outstanding thing and an able thing, but I don't believe you can charge the Indian with that. [232] That is something for their own benefit in asking this lien.

In the original case, we had three elements. One, was she a member of the band of Indians? That was fixed, and you didn't have to decide that.

The Government, which was the respondent in the first case, admitted she was entitled to the patent provided she could prove she was an adopted

daughter or someone had had authority to select for her, because the first step in an allotment in severalty is a selection, and a minor as such has no authority to do it. She is not deemed to be competent—he or she.

Those were the only issues left in this case, plus one other, and that is the reason for this so-called abortive appeal or protective appeal. I remember now why we took an appeal. We took the appeal because in the communication in which I confessed judgment I decided we were objecting to an insertion in it, as in the Lee Arenas judgment, of a reserve power to fix a lien on the property. We ultimately decided that didn't make any difference, and we were still protected in the supplementary proceeding, and we dismissed the appeal in one week.

I feel, in fixing the value of the fees in this case, one, you are faced with, what issue in law did the attorneys have to take care of? I submit the only issue of law for the Indian they had to take care of was whether or not she was an [233] orphan, or whether someone who had authority could make a selection for her, because the Government by express statement in VI said if they could establish one or both of two things, she was entitled to all the relief she prayed for, except the reserve power of the lien, which is not for her benefit but for theirs.

Therefore, while I recognize, your Honor, in this other forum, when we got to trial, where the attorneys established again Lee Arenas was entitled to

a trust patent, and there was some question about that, the scope of their fees and their work is entirely different in character from the scope of the work in this case.

The second thing I think your Honor should consider is that after the pleadings were past and the admissions made, as I have stated, to what extent did they have any particular problem and how did they meet it?

No one has higher respect for Judge Preston and his associates than I do, but they are human beings, and sometimes human beings act very effectively and sometimes not very effectively. With the greatest respect for them, I think in this particular case they didn't make a very good presentation, because, really, the only issue to be determined was whether or not there was any legal authority.

That was a matter that would have to be made by resolution or by some writing, and if they had taken a deposition or [234] if they had made any request for admissions, or anything of that character of work which we do in equity of a discovery nature, that matter would have come out.

It is true, also, your Honor, if my fees were being fixed, you would have the same complaint against me here, because of stress of work or because there were some other features of other cases I didn't handle, I lost track of it, or we would undoubtedly never have forced the trial of this lawsuit.

The Government certainly, as far as my knowledge is concerned, in such instances as I have represented it, has never come into this court and

contested something which we knew we had no right to contest. The minute Judge Preston found that, we admitted it.

I say those things should be weighed in the matter of services rendered to this Indian and how much they should be paid. They should be paid a reasonable fee and a substantial fee. But I think the substantiality of it has to be in relation to what they got for the Indian.

That brings up the next point. As you say, we have quite a difference of values. In reference to Mr. Beckley's testimony, I am not talking about personal elements, but his testimony, which you have to weigh. You have before you two types of testimony, and I am going to endeavor to get this written up. You have the testimony in the last day or two, and you have the testimony in [235] Exhibit 8.

I expect to present this in a memorandum of law, and I merely mention that in Exhibit 8 the basis of his testimony was he had been very active in this area, had made a number of sales, and he knew about a great number of sales. I took his deposition, and when we interrogated him here he said he didn't know of a single sale, he didn't know of any sale in the reservation, and he didn't know any sale which he deemed comparable, except a few lot sales.

The conception of Mr. Beckley was this: not that the property as it now stands today or in 1948 had this particular value, but that if in some manner you could completely change the attributes and the

conditions that exist here, so that the property would be in an entirely different position, not only freed of restrictions, because that, of course, was an assumed element of the fee, but also freed of all the environments that belong to others who also had vested rights, and if the City of Palm Springs, as he said it would have to, but hasn't yet, in due course if the City of Palm Springs pushes toward direction and various other changes take place—and bear in mind he said specifically in answer to one of my questions, if not more, he couldn't fix the time, he couldn't estimate the years in time, but he felt positive that is what was going to be done.

There is where Judge Preston and I get to a fixed impasse. It is the fixed law in the federal court, and I know it is in [236] this State, that you can't fix present value on the hypothesis of what the value will be under changed conditions, and, particularly, you cannot do so if the persons who would be the assumed buyer and seller could not control those conditions. That is where you get this availability or adaptability.

As Judge Preston told you, and we can answer everything he said in good faith, he said this whole Section 14 had been allotted in severalty to various Indians. We have exhibited in A and B the fact that these various selections are surrounded by allotments in severalty to different Indians, not to Eleuteria Brown or to anyone she can control, and not anyone the Federal Government can control, because even under those restrictions, which Judge Preston feels are an impairment rather than

an aid to the Indian, the most the Federal Government can do is consent to a change. It can't force a change, because the Indian has the vested equitable right, and he has the right to determine whether he wants to make any change.

In the light of that, we have the testimony of the Government's witnesses, despite the fact that on the face this slum area looks bad, actually it produces more revenue, and we will eventually get to that after your Honor renders his decision, because, as I read the mandate of the Court of Appeals, after you have finally fixed the fees, you have to allow a certain length of time and arrange for payment in that time, I think we will try to go into what the income is, and it may be you [237] will make some arrangements for payment out of income, but I am just mentioning that to tie it up to what the witnesses said.

They said the income from the slum area would be greater than if you required conformance with the zoning ordinance, which limits it to certain residences with an expressed area of 7,500 feet.

As far as Mr. Beckley is concerned, I think the whole matter might be summed up in this. Mr. Beckley was not fixing present values. He was fixing an anticipatory value based on changed conditions, and I don't think that is the appropriate basis to fix value of either attorneys' fees or any other value.

As to this last witness, Mr. Gallagher, of course, Mr. Gallagher should be excused, because it is quite apparent he was being called here without any

chance to refresh himself, and if he had done that he would have declined, I think, to testify as to these parcels. I may be wrong. But certainly the approaches which he described on cross-examination are most alarming.

If you could fix value by taking entirely contrary-type property, property zoned for business and used for business under the highest development, and then arrive merely at some estimate of the value of the 640-acre sections, add them together, divide them by four, and then by the number of acres, [238] and if that is your estimate of value on separate pieces, whether they were inside or outside the perimeter, whether they were open lands or whether they were lands as these, surrounded by many other dwellings of low-class nature, and all other factors of that kind, I submit you get to the point where you have no effective measure of value at all.

It is true the Supreme Court has said market value is an informed guess, but I earnestly believe and I recommend your Honor to consider that word "informed." It is not just a guess, and that is what this last witness' valuation was.

As to the Government's witnesses, you saw them and you will read the record before. Judge Preston stipulated to that and I want you to read it. You will find out from the record that these men had been active in this particular area. Mr. Evans had subdivided property there. Mr. Jones had appraised many other properties in the Palm Springs area, both for others and for Government acquisition in

the area, because we acquired land for a hospital, an airport, military training, et cetera.

In addition to that, Mr. Jones detailed to you various comparable properties. It is true, under the rulings the court had to make, you couldn't get specific prices, but unless you believe the man was testifying falsely under oath, I think you can readily determine and believe he had the information there, and he had it to utilize. [239]

Mr. Beckley didn't have any such information as that, and didn't claim to.

So it seems to me, while no opinion on value can be said to be so firmly based that it is certain, you can't make those things certain, that they more nearly comport to an informed guess as to the value, which is what we term value.

I feel that in this matter the court should fix the value in the light of the Indian's interest. I don't mean to disparage it except to the extent that that is the way it was. That is what these lawyers could recover and the only thing they could recover for the Indian. That is all she would have.

I believe the definition in the hypothetical question will be supported by authorities, and I expect to show every single part of the definition is supported by authorities.

Then I believe your Honor can fix that value, which I think you must under the mandate. A reasonable fee should be fixed for these lawyers, considering what they did and what they were confronted with, but I don't believe, and I say it in all sincerity, I don't believe they are entitled to be

compensated by her for work which they did under a separate contract for someone else, any more than if they would come to some other lawyer that had nothing to do with it, that she would be required then to pay.

Lastly, there is one other thing, and then I am going to close. I can no more prophesy what the United States or any [240] of its executive departments will do than I can prophesy about the moon. I have, however, been with the Federal Government now some twelve and a half years, and your Honor has served honorably many years as part of its judiciary, and for that reason has been aware of the matters I now mention. That is, while it acts in varying degrees, and with sometimes very conflicting ability, and has lots of money, you can't even spend a thin dime unless there is some appropriation from which it can be taken. At the present moment, I say in all sincerity, I know of no funds the Congress has appropriated for the Department of the Interior which can be utilized to pay such a judgment as this. I say that for two reasons.

In the first instance, the first of the Court of Appeals decisions in the Lee Arenas case, the Court of Appeals expressly held it would not be a judgment against the United States, but must be a judgment only as against the Indian. In other words, it would not be such a judgment as would come under the federal statute of an obligation of the United States, which it would have to directly pay.

Secondly, while the United States holds very con-

siderable sums for various Indians, it is my understanding of the law those funds are all held in a trust capacity and the funds belong to or are to be used for the benefit of the Indians, and, therefore, even though our Sacramento office may hold thousands of dollars for the various Indians in the area which [241] it controls, we couldn't reach into that fund and pay this judgment which you will render against Eleuteria Brown Arenas.

It may be, and it may possibly be true, your Honor, that when your judgment is rendered and that of Judge Mathes has been rendered, the Department of the Interior, if it has time, may go to Congress and ask to have funds appropriated. I agree with Judge Preston it would be a terrible thing to have this property sold. One thing I am afraid of is, once this is established, with the amount of lots you have there, the whole area may be sold.

I say, however, in fixing your judgment, you will have to assume at the present time it is going to be enforced in the manner which the mandate of the court and your previous judgment indicated. It will have to be enforced in some form out of this property, and I think that is a proper consideration for the court to take, and that is on a quantum meruit basis that the lawyers' fees, in my opinion, should never equal completely the recovery for the client, else it would seem to me the quantum meruit would be self-destructive and the client would have gained nothing.

I would like the privilege of supplementing these

remarks with a brief at such time as your Honor fixes, and also supplementing my motion to strike with a memorandum of authorities.

Mr. Preston: I don't care to take up but a moment. I should tell your Honor there is pending in this court a case [242] designed to correct the inequities and miss-errors, I will call them, of the Department of Indian Affairs as to every allotment in this area. It relates principally to the question of water that is briefed in the brief I handed to your Honor.

When that case comes to trial and is adjudicated, there will be a benefit conferred upon the property here, upon the Lee Arenas property, and upon all the other properties, and there isn't any reason in the world why the attorneys in this case may not be paid out of the funds that belong to the tribe and that they are collecting from the property now.

I don't care to take the time of the court to reply to the statement of counsel at all, because I don't think that this court needs any education as to how to weigh evidence.

The reference, for example, to my witness, Mr. Gallagher, was not a fair reference. He said that he studied these properties from every possible angle. It is true he used a method that was described by counsel, but he also said, after so doing, he checked it with the sales of other properties, and leases and so forth, and found it to be fairly accurate.

An estimate of value is bound to be an estimate only. It can't be an exact science.

I don't think anything will be gained by prolonging this argument, except I want to say two or three words about the nature of the Indian's title. I have a brief which has been [243] brought to me from my office, and which contains quotations as to the nature of the Indian's property. I will incorporate all of this in the brief which I shall present to your Honor.

The Court: I understand you have closed your oral argument now?

Mr. Brett: Yes.

The Court: The court is going to give you time to file briefs. How much time do you want?

Mr. Brett: Who is to file first?

The Court: The petitioners. They have taken the affirmative side. I should think this would be like any other lawsuit.

Mr. Preston: Have you any suggestions as to limits to be put on the briefs?

The Court: I want to get through with it as soon as I can, while this matter is fresh in my mind. I don't believe in keeping these things for two or three months. I don't want to cramp you for time, either, but if you can get it in in a reasonable time, I will give each one the same amount of time.

Mr. Preston: Will the record be written up?

Mr. Brett: I haven't been able to get Washington, but I am going to try to get authority by phone to have it written up. I will get the part the court asked for.

Mr. Preston: If it is written up, I will want a copy. [244]

The Court: I have tried some cases here this term where they have asked the Department to furnish a copy of part of the transcript and they have said they can't get authority.

Mr. Brett: That is true, and I don't know if I can. I will try to.

Mr. Preston: Since the United States is a party, I should imagine they would do it.

How long are you going to be here, your Honor? Will you be here until the end of this month?

The Court: No. I am going to leave on the 7th of next month. I will have to dispose of this in Boise.

(Discussion between court and counsel.)

The Court: Suppose you each have ten days. Say the petitioners have ten days and the respondent will have ten days thereafter to reply. That will be 20 days.

(Discussion off the record between court and counsel.) [245]

The Court: You agreed you would furnish me the hypothetical question. You can get that all in before the 20 days, and if you get a copy of this much here, it will be helpful.

Mr. Brett: Yes, sir. I am going to try. I haven't got any authority to order the transcript.

The Court: I will commence disposal of the case after 20 days. I will study it between now and then, but I can't wait indefinitely.

Mr. Brett: I will promise everything I can, but

I can't commit myself, because they have said that I can't commit myself until they have authorized it.

The Court: I understand that. I will allow each 10 days if you desire to file a brief. The respondent will be allowed 10 days thereafter to file a brief. That extends the briefing to 20 days.

Mr. Brett: Is it a brief on the law or facts or both?

The Court: It is up to you. Then I will have some definite time when I can commence to dispose of this case.

Mr. Brett: Do I not understand your present ruling this way: Judge Preston has 10 days to file a brief, and if he files it sooner, my time starts, but if he does not file a brief, I can still file a brief provided I get it in within 10 days?

The Court: Yes, but he must notify you, and then I will know the definite time when I can start in and get this case [246] finally submitted. Of course, I will be working on it between now and 20 days, but I won't make any conclusions.

Mr. Brett: My thought would be this, your Honor. If I can get the authority, I want the whole transcript. If I can't get that, I am going to go for the two points I mentioned. If I do get the authority, I will order the whole thing.

The Court: Well, I do want that hypothetical question that you put the other day and your argument and your motions here and the argument today. If you can get copies of those for me, it will help me.

Mr. Brett: As soon as I can get upstairs, I will ask for the authority.

The Court: Maybe you can do it in 10 days. I want to dispose of this before I forget about it.

Mr. Brett: Your Honor has made notes about the value.

The Court: Yes, but there is some conflict. I thought in your briefs, if you will state specifically what you claim the values are under this record of the three parcels, that will help me to check it with my notes.

Mr. Brett: And our reasons as to why you should accept it.

The Court: But keep those separate, each parcel.

Mr. Brett: Yes, sir.

The Court: As I see it, attorneys should be compensated [247] for a reasonable amount for their services in this case. In order to determine that, we have got to go to what was the Indian's interest under this decision of the Circuit Court of Appeals. Then we have to determine what procedure do the petitioners have to pursue to realize that. Those are the questions involved here.

Mr. Preston: It is quite clear, isn't it? If we have to sell, we sell the whole interest in the allotment. That is clear.

Mr. Brett: Yes, there is no dispute. If you have to sell, we have to sell the whole interest.

Mr. Preston: Yes.

Mr. Brett: On that phase, the Department has authorized me at the appropriate time, after you have rendered judgment, to request consideration

of the appointment of a receiver to handle these particular properties and recover income and in line with the mandate to fix a reasonable time before sale to see whether or not it can be worked out to pay it off. In other words, we may find some other way of paying it off.

The Court: I said I would appoint a trustee to go out and find what is the reasonable value and then set a day, keeping jurisdiction here in the court, when you could come in and have a hearing as to what were the reasonable values. The only difference is they have said I shouldn't fix a per cent of the value but I must fix a definite amount of money. There isn't [248] any difference. It has got to be money. The only thing is you have to realize it out of these allotments.

Mr. Brett: I think we will be able to work it out.

The Court: I would like to hear from you on that question of procedure.

Mr. Preston: The Indian's title to this land is determined, as far as I know.

The Court: Well, you do that. Do you have a brief you want to leave?

Mr. Preston: That is the brief I intended to use. I want to use it in the Lee Arenas case.

The Court: I believe that finally submits the matter to the court. I want to say, counsel, I thank both of you for your able assistance to me in trying to arrive at a legal and just conclusion on this hearing. You both have been of great help to me, although I have got to do some further investigating after this procedure here.

I don't think any court ought to have any trouble in determining under the evidence what is the reasonable compensation to be paid to the petitioners here, the attorneys. They have rendered their services and the Court of Appeals recognizes that. They haven't told me how to get it is all. I don't know how it can be paid except in dollars.

Counsel has admitted you are entitled to compensation and it would take a pretty high court to tell me you are not [249] entitled to something for all the work you have done in this particular case. The lawyers haven't been paid a cent. It is a question of how to get it to pay you.

If the Government wants to pass some act paying you afterwards, that is your problem, as to how you are going to get your money.

It is up to me to find the procedure now. If I can impress a lien and give them a right to foreclose, that is a doubtful question. I don't think I will have much trouble in determining the amount of compensation. These fees have got to be paid out of the interest of the Indian. What is that interest? It is the allotment. What is it worth? I have got to determine that interest. That is one of the things to be determined. I have got to definitely fix the amount of the compensation to be paid out of the allotment.

The Indians haven't any other way to pay. They have the equitable title, as you say. It is a question of how it is to be done. I will try and define some procedure the best I can under this, but you haven't

put up any easy question for me. It is a question of procedure.

Mr. Preston: We will tender you a form of decree, if that is what you want.

The Court: Well, now, off the record.

(Discussion off the record between court and counsel.) [250]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 16th day of February, A.D. 1951.

/s/ S. J. TRAINOR,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 126, inclusive, contain the original Complaint for Trust Patent; Answer of Defendant United States of America filed Nov. 25, 1947; Stipulation and Order for the Admission of Evidence; Decision; Findings of Fact and Conclusions of Law filed June 23, 1948; Judgment filed June 23, 1948; Petition for Supplemental Decree for Attorneys' Fees and Expenses Advanced and Other Relief; Order to Show Cause; Special Appearance of and Motion to Dismiss by United States of America; Affidavit of Irl D. Brett; Answer of Eleuteria Brown Arenas filed Oct. 28, 1948; Answer of United States of America lodged Oct. 29, 1948; Opinion filed Jan. 3, 1949; Findings of Fact and Conclusions of Law filed Feb. 4, 1949; Judgment and Supplemental Decree filed Feb. 4, 1949; Notice of Appeal filed Feb. 14, 1949; Statement of Points on Appeal filed Apr. 4, 1949; Opinion filed Jan. 29, 1951; Findings of Fact and Conclusions of Law filed Mar. 2, 1951; Judgment and Supplemental Decree filed Mar. 2, 1951; Notice of Appeal filed May 1, 1951; Statement of Points on Appeal filed May 22, 1951, and Designation of Record and a full, true and correct copy of Minute Order filed and entered Mar. 16, 1949, and of the Docket Entries from January 9, 1947, to March 25, 1949,

which, together with original Petitioners' Exhibits 1 to 10, inclusive, and Respondents' Exhibits A to U, inclusive, and copies of reporter's transcript of proceedings on October 29, 1948, and November 27, 28 and 29, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 6th day of June, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12962. United States Court of Appeals for the Ninth Circuit. United States of America and Eleuteria Brown Arenas, Also Known as Della Nicholson, Appellants, vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12962

UNITED STATES OF AMERICA and ELEU-
TERIA BROWN ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD TO BE PRINTED

The United States of America and Eleuteria Brown Arenas, appellants in the above-entitled case, adopt the statement of points filed in the District Court as the statement of points to be relied upon in this Court, and desire that the whole of the record as filed and certified be printed with the following exceptions:

1. Petitioners' Exhibit No. 8. This exhibit is a copy of the printed record on a prior appeal of this case (No. 12218), and the parts thereof considered material have been individually designated as items 1 and 7 to 20, inclusive, in the designation of record filed in the District Court.

2. Petitioners' Exhibits 9 and 10 and Respondents' Exhibits A, B, and D. These exhibits are maps of the area, and a motion will be made for consideration in their original form.

3. Respondents' Exhibits E to S, inclusive. These exhibits are photographs, and a motion will be made for consideration in their original form.

Respectfully submitted,

/s/ A. DEVITT VANECH,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of
Justice, Washington, D. C.

Certificate of Service

Service of the foregoing statement of points and designation of the parts of the record to be printed was made on appellees by mailing a copy thereof, via air mail, postage prepaid, on June 19, 1951, to Mr. John W. Preston, 712 Rowan Building, Los Angeles 13, California; Mr. Oliver O. Clark, 710 Knickerbocker Building, Los Angeles 14, California; and Mr. David D. Sallee, 510 Garfield Building, Los Angeles 14, California.

/s/ JOHN C. HARRINGTON,
Attorney, Department of
Justice, Washington, D. C.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF
ORIGINAL EXHIBITS

The United States of America and Eleuteria Brown Arenas, appellants in the above-entitled cause, move this Court for an order authorizing the consideration of Petitioners' Exhibits 9 and 10, and Respondents' Exhibits A, B, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, and S, even though said exhibits are not included in the printed record, such consideration to be the same as if said exhibits had been designated for inclusion in the printed record.

These exhibits are either maps or photographs of the area involved. They were designated as part of the record on appeal so that they would be available for examination or reference in this Court. However, it is not believed that they are of sufficient materiality to justify the expense of reproduction in the printed record.

/s/ A. DEVITT VANECH,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of
Justice, Washington, D. C.

Certificate of Service

Service of the foregoing motion for the consideration of original exhibits was made on appellees by mailing a copy thereof, via air mail, postage prepaid, on June 19, 1951, to Mr. John W. Preston,

712 Rowan Building, Los Angeles 13, California;
Mr. Oliver O. Clark, 710 Knickerbocker Building,
Los Angeles 14, California; and Mr. David D.
Sallee, 510 Garfield Building, Los Angeles 14, Cali-
fornia.

/s/ JOHN C. HARRINGTON,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed July 2, 1951.

[Title of Court of Appeals and Cause.]

ORDER FOR CONSIDERATION OF
ORIGINAL EXHIBITS

Upon consideration of the motion filed by appel-
lants for an order authorizing consideration of
Petitioners' Exhibits 9 and 10, and Respondents'
Exhibits A, B, D, E, F, G, H, I, J, K, L, M, N, O,
P, Q, R and S, and good cause appearing therefor,
it is hereby ordered that said exhibits shall be used
and considered by this Court upon said appeal with
the same force and effect as though they were in-
corporated in and made a part of the printed tran-
script of record.

So Ordered:

/s/ CLIFTON MATHEWS,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed July 2, 1951.